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88-1178

No.

In The
Supreme Court of the United States
October Term, 1988

THOMAS E. KEANE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Shall this Court resolve the conflict of decisions between the Seventh Circuit in the instant case and the Fourth Circuit in *United States* v. *Mandel* (App., *infra,* 25a-46a) concerning the availability of *coram nobis* relief to persons convicted of mail fraud for conduct which *United States* v. *McNally,* 483 U.S. ____, 107 S.Ct. 2875 (1987), holds to be not criminal?

2. Did the Court of Appeals err in adopting a new, restrictive standard for the granting of a writ of error *coram nobis* which conflicts with the decisions of this Court and other circuits by:

a. denying relief solely because the indictment could be interpreted as stating an offense, even though the jury was not required to find a criminal violation, and even though the prosecution centered on conduct which is not criminal;

b. denying relief, contrary to the holdings in *United States* v. *Morgan,* 346 U.S. 502 (1953), and *Sibron* v. *New York,* 392 U.S. 40 (1968), on the basis that there are insufficient collateral consequences from a felony conviction, without recognizing the presumption that adverse consequences necessarily follow from such a conviction; and

c. denying relief on the basis that the petitioner unsuccessfully asserted at trial and on appeal the very same arguments that ultimately were adopted by this Court in *McNally*?

3. Did the Court of Appeals err in creating a restrictive standard for *coram nobis* relief which gives higher judicial priority to docket control than to providing a remedy for convictions tainted by errors of the most fundamental character?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Thomas E. Keane respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-13a) is reported at 852 F.2d 199. The opinion of the District Court (App., *infra*, 15a-24a) is reported at 678 F. Supp. 708.

JURISDICTION

The judgment of the Court of Appeals was entered on July 5, 1988. A timely petition for rehearing was denied on October 17, 1988, with two judges voting to rehear the case *en banc* (App., *infra*, 14a). On November 28, 1988, Justice O'Connor issued an order extending the time for filing a petition for a writ of certiorari to and including January 15, 1989.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT

The question presented by this petition is whether *coram nobis* relief is available to a public official who was convicted and served his sentence of mail fraud after being tried for conduct which the law does not treat as illegal.

In *McNally* v. *United States*, 483 U.S.___, 107 S.Ct. 2875 (1987), this Court held that "the mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government." 107 S.Ct. at 2879. Jury instructions premised upon the intangible rights theory of mail fraud constituted error because they "permitted a conviction for conduct not within the reach of §1341." 107 S. Ct. at 2882.

Petitioner Thomas E. Keane ("Keane") was indicted on May 2, 1974, and charged with twenty counts of mail fraud in violation of 18 U.S.C. §1341, and one count of conspiracy to commit mail fraud in violation of 18 U.S.C. §371, for allegedly scheming to deprive the citizenery of the intangible right to good government. At the time of the indictment, Keane, a Chicago alderman, was chairman of the Finance Committee of the Chicago City Council.

The jury that convicted Keane was instructed that it could find him guilty solely for conduct which *McNally* holds is not illegal, i.e., a scheme in which neither money nor property is involved.

The Seventh Circuit has summarized the indictment as "charg[ing] that Keane defrauded the people of Chicago out of their right to his honest services." (App., *infra*, 1a). In particular, the only charging paragraph of the indictment alleged a "scheme

and artifice to defraud" directed at intangible rights to good government. Keane was accused of participating in a scheme to deprive:

> "(a) The City of Chicago and its citizens and THOMAS E. KEANE'S fellow Aldermen on the Council of the City of Chicago of their right to the conscientious, loyal, faithful, disinterested and unbiased services, decisions, actions and performance of official duties by defendant THOMAS E. KEANE, in his official capacities as 31st Ward Alderman and as Chairman of the Committee on Finance of the City Council, free from corruption, partiality, wilful omission, bias, dishonesty, official misconduct, conflict of interest and fraud;
>
> "(b) The City of Chicago and its citizens, and THOMAS E. KEANE'S fellow Aldermen on the Council of the City of Chicago, of their right to have the City's business and its affairs conducted honestly, impartially, free from deceit, craft, trickery, corruption, fraud, undue influence, dishonesty, conflict of interest, unlawful obstruction and impairments, and in accordance with the laws of the State of Illinois and the City of Chicago, which said scheme and artifice to defraud is set forth more fully below." (Indictment, paragraph 12)

There was no allegation in the indictment that Keane's conduct deprived or was intended to deprive the City, or anyone, of money or property.

Indeed, following Keane's conviction, the government agreed to a Supplement to the Pre-Sentence Report which specifically disclaimed any contention that the indictment involved a scheme directed at money or property.

Most critically, as in *McNally,* the jury was given erroneous explicit instructions that it could convict Keane on the exclusive basis of a scheme directed towards intangible rights:

> "Now, the word 'scheme and artifice' includes any plan or course of action to deceive others of something to

> which they are entitled. *The object of the scheme need not be money or any form of tangible property. Therefore a scheme to defraud or deprive the citizens of a city, a municipality, of the honest and loyal services of a public official may come within the meaning of scheme and artifice as set forth in the mail fraud statute."* (RP 3414, instructions to jury). (emphasis added)[1]

The trial court has acknowledged that its instruction was erroneous in view of *McNally*. (App., *infra*, 23a).

This erroneous jury instruction was the culmination of a prosecution in which "[t]he intangible rights approach was . . . a centerpiece of the trial . . . . " (App., *infra*, 11a).

The unvarying theme of the prosecution was civic disloyalty, not loss of property rights. The opening statement of the prosecutor summarized the case as concerning an "elected official" who was "derelict in his duty" by defrauding the public and the City Council of "the right to the true and faithful services of our elected officials." (RP 326, opening statement). The prosecutor advised the jury that evidence:

> "will show that he cheated the citizens of Chicago and his fellow aldermen out of his obligation and duty to provide true and faithful services for their benefit and not for his own benefit, not for his own financial profit, and that he is guilty as charged in the indictment." (RP 349, opening statement).

At the conclusion of the evidence, the government summed up its case in exactly the same manner. It began by stating that its obligation had been to "prove that the defendant Thomas Keane engaged in a scheme to defraud the citizens of Chicago of his honest, loyal services . . ." (RP 3263, closing argument). It stressed that the object of a scheme violative of the mail fraud act "need not be money or any form of tangible property." (RP 3264, closing argument). The jury was told that the government's

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[1] "RP" refers to the Report of Proceedings in the trial court.

case could be proved by showing "[a] scheme to deprive the citizens of the municipality of the honest and loyal services of a public official . . . ." *(Id.)*.

Emphasizing that mail fraud could be based on a breach of public trust rather than a deprivation of property, the government argued that the injury from a loss of intangible rights to good government was far greater than any financial injury:

> "as you will learn from his Honor's instructions, a scheme to deprive public officials of information material to a decision which they are required to make in their official capacity may also come within the meaning of the mail fraud statute. That is not a piece of property, that is not a dollar, that is not a house, that is not something tangible. *It is intangible, but I will tell you what, the faithful and honorable services of a public official are worth more than their weight in gold.*" (RP 3284-5, closing argument) (emphasis added).

The failure to prove any property loss was irrelevant, the government contended, since Keane could be convicted for a scheme to deprive the City of "faithful and honorable services" that were beyond price.

> "Tom Keane didn't let his fellow aldermen know what was going on. He subverted the democratic process. That is a real fraud on the citizens of the City of Chicago, ladies and gentlemen. *It is as real as if he stole a million dollars out of the city treasury. It is worth more than that million dollars.*" (RP 3290, closing argument) (emphasis added).
>
> * * *
>
> "*There was a real loss to the City of Chicago in the sense of a breach of fiduciary duties* and the breach of the obligation of Alderman Keane as I have indicated to you. That loss to the City of Chicago is the loss contemplated by the mail fraud statute in this case." (RP 3303-4, closing argument) (emphasis added).

* * *

> "The basic ingredient which we demand of all our public officials, their loyalty and honesty, was absent when Alderman Keane operated in the way which I have described to you. *The democratic system suffered a real loss.* The ability to debate with all the facts before it, not just the facts that Alderman Keane wants to show. *By doing so, a fraud was committed on the city, the people of the City of Chicago and his fellow aldermen.* The mails were used in furtherance of that scheme on 17 separate occasions which is a violation of the mail fraud statute." (RP 3304-5, closing argument) (emphasis added).

Even on rebuttal, the government's emphasis remained fixed — the jury need only find that Keane undermined good democratic government, since that was a fraud worse than a fraud of property:

> "Mr. Keane's actions . . . do more and did more to undermine the democratic process . . . than any number of things unimagined. He strikes at the very heart of that because, as Mr. Montana said, the *true and faithful services of a public official are worth a million times their weight in gold.*" (RP 3356, rebuttal) (emphasis added).

* * *

> "our [the government's] theory is very simple, he never gave the people of Chicago and his fellow aldermen his true and faithful services . . ." (RP 3381, rebuttal).

Moreover, the prosecutor sought to deemphasize the importance of showing any monetary loss, stating "it is not really in any strict sense what is involved in this case . . ." (RP 3382, rebuttal). Thus, the prosecution concluded its argument to the jury by saying:

> "the basic issue in this case is whether or not Mr. Keane acted in the best interest of his constituency. . ." (RP 3391, rebuttal).

The trial court's erroneous instructions, permitting conviction on the basis of a scheme to deprive the citizens of "the honest and loyal services of a public official," confirmed the thrust of the prosecution's case. The jury was invited to convict Keane solely on the basis of a scheme to deprive the public of intangible rights to good government. *McNally* holds that this is not conduct covered by the mail fraud act.

On October 9, 1974, the jury convicted Keane on 17 counts of mail fraud and on the conspiracy count. The conviction was partially affirmed by the Seventh Circuit, which reversed the conviction for three counts of mail fraud. *United States* v. *Keane*, 522 F.2d 534 (7th Cir. 1975).

This Court denied Keane's petition for a writ of certiorari. 424 U.S. 746 (1976).

Keane was sentenced to a term of five years, fined $27,000, and ordered to pay the costs of prosecution. Keane paid his fine and the costs. He served a term of incarceration. He has since been discharged.

The Seventh Circuit has recognized, in affirming the denial of Keane's petition for a writ of error *coram nobis*, that "Keane objected before, during, and after trial to the 'intangible rights' aspect of the indictment and jury instructions." *United States* v. *Keane*, (App., *infra*, 3a).

Following this Court's decision in *McNally*, Keane filed his petition for a writ of error *coram nobis* on August 28, 1987, invoking the District Court's jurisdiction under the All-Writs Act, 28 U.S.C. §1651(a). The petition was denied.

The Seventh Circuit, although ruling that "it would be difficult to conclude . . . that a jury instructed as this one was *necessarily* found the existence of a scheme to defraud someone of 'property' within the meaning of *McNally* [and subsequent cases] . . . " (App., *infra*, 11a) (emphasis in original), denied Keane's petition for a writ of error *coram nobis*. In so doing, it restrictively redefined the terms under which *coram nobis* relief is available. Although the Seventh Circuit recognized that the government had not proven Keane to be guilty of mail fraud, it held that the writ was not available because (1) Keane had

previously asserted the *McNally* argument without success (more than a dozen years before the *McNally* decision); (2) he supposedly was not suffering from sufficient collateral consequences from his conviction; and (3) *coram nobis* cannot remedy any error at trial so long as the indictment stated an offense. (App., *infra*, 12a). The Seventh Circuit's ruling expressly was based on the belief that the scarcity of judicial time required limitations on efforts to rectify erroneous convictions. (*Id.* at 12a-13a).

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE SEVENTH CIRCUIT IN THIS CASE AND THE FOURTH CIRCUIT IN *UNITED STATES* V. *MANDEL* AS TO THE AVAILABILITY OF *CORAM NOBIS* RELIEF IN CASES WHERE A JURY WAS PERMITTED TO CONVICT A DEFENDANT FOR CONDUCT WHICH IS NOT CRIMINAL.

This petition should be granted to resolve a fundamental conflict between the circuits as to the standards for the granting of the writ of error *coram nobis*.

This Court has established that the writ is available to challenge the convictions of persons no longer in custody, and should be granted to correct "an error of the most fundamental character." *United States* v. *Morgan*, 346 U.S. 502, 512 (1954). In the instant case the jury was permitted to convict a defendant for conduct which is not criminal. Disregarding *Morgan*, the Seventh Circuit refused to grant *coram nobis* relief for such a fundamental error.

The Seventh Circuit's refusal to follow the established principles of *coram nobis* has created a conflict between the circuits. Most strikingly, the Fourth Circuit has refused to follow *Keane* in its decision in *United States* v. *Mandel*, No. 88-7027, (4th Cir. Nov. 7, 1988). (App., *infra*, 25a-46a).

The *Mandel* case is essentially indistinguishable from *Keane*. *Mandel* also involved the mail fraud conviction of a well known public official (the former governor of Maryland) after a prosecution grounded upon the intangible rights theory which was invalidated by *McNally*.

The charging paragraphs of the *Mandel* indictment were almost identical to the *Keane* indictment. Mandel was alleged to have devised a scheme directed at the citizens' right to "the conscientious, loyal, faithful, disinterested and unbiased services, actions and performances of official duties . . ." (App., *infra,* 27a). In *Keane* the indictment alleged a scheme to defraud the citizens and city council of "the conscientious, loyal, faithful, disinterested and unbiased services, decisions, actions and performance of official duties. . ." (Indictment, paragraph 12a).

As in *Keane,* Mandel's conviction was secured by a jury instruction that invited a guilty verdict upon nothing more than a showing of a scheme directed to intangible rights to good government. The erroneous jury instructions also were almost identical. The jury that convicted Keane was told that:

> "a scheme to defraud or deprive the citizens of a city, a municipality, of the honest and loyal services of a public official may come within the meaning of scheme and artifice as set forth in the mail fraud statute." (RP 3414, instructions to the jury).

The *Mandel* jury likewise was instructed that:

> "[a] citizens' right to have his Government conducted honestly and impartially, and to the faithful and loyal services of public officials, are things of value whose fraudulent deprivation may fall within the meaning of a scheme to defraud as used in the mail fraud statute." (App., *infra,* 29a).

The Seventh Circuit issued its opinion in *Keane* while the *Mandel* case was being briefed to the Fourth Circuit. The United States Attorney devoted approximately three pages of his reply brief in *Mandel* to urging the Fourth Circuit to follow *Keane* (App., *infra,* 47a-53a), underscoring "[t]he similarity of this case and *Keane* . . . . "(App., *infra,* 50a, n.2).

The Fourth Circuit refused the government's plea to follow *Keane.* It rejected every aspect of the Seventh Circuit's restrictive reinterpretation of the standards for *coram nobis*:

A. In *Keane,* the Seventh Circuit refused to grant *coram nobis* although the jury instructions sanctioned a conviction for non-criminal conduct, stating that such an error "is not the sort of fundamental defect that produces a complete miscarriage of justice." (App., *infra,* 12a). It held that the conviction could not be challenged by *coram nobis* so long as the indictment could be read to state an offense.

The Fourth Circuit, however, expressly adhered to the "fundamental character" standard for *coram nobis* relief laid down by this Court in *Morgan.* It ruled that the writ was available to Mandel and his codefendants because:

> "[b]ased on the Supreme Court's ruling in *McNally,* the jury instructions in this case improperly allowed petitioners' convictions for acts which are not within the reach of the mail fraud statute." (App., *infra,* 38a).

The Fourth Circuit then discussed the government's argument, based on the *Keane* decision, that *coram nobis* was improper where the change in law "only brings into question the propriety of the jury instructions." (*Id.*). It rejected this narrow view of *coram nobis* as:

> "ask[ing] this court to review the evidence and decide what a jury would or might have found if the instructions had been proper, or, to put it more bluntly, it asks us to convict the defendants of crimes with which they were not charged. This, we decline to do." (*Id.*).

B. In *Keane,* the Seventh Circuit imposed a strict requirement of proof of persisting adverse consequences from a prior conviction, and explicitly refused to acknowledge that the "black mark" of a felony conviction satisfies this requirement. (App., *infra,* 8a). The Fourth Circuit, however, stressed in *Mandel* the adverse impact of being "branded as criminals" through a wrongful conviction. (App., *infra,* 38a).

The Fourth Circuit is not the only court of appeals to conflict with the Seventh Circuit on this element of its new restrictive test for *coram nobis.* The *Keane* opinion expressly concedes that the Seventh Circuit disagrees with the Ninth Circuit's viewpoint, as stated in *Hirabayashi* v. *United States,* 828 F.2d 591 (9th

Cir. 1987). (App., *infra,* 8a).

C. The third element of the Seventh Circuit's new *coram nobis* test was the assertion that *coram nobis* is not available to "relitigate issues fully ventilated at the time of the conviction." (App., *infra,* 6a). The Seventh Circuit, thus, could conclude that Keane could not obtain *coram nobis* relief because he had objected, before, during and after trial, to the intangible rights aspects of the prosecution. (App., *infra*, 28a-29a).

In *Mandel,* the Fourth Circuit refused to bar *coram nobis* to those who had prematurely anticipated a dispositive expression of the law by this Court. The *Mandel* defendants were granted the writ even though they, too, had asserted throughout the trial that mail fraud requires a scheme directed at something more tangible than the right to good government. (App., *infra*, 28a-29a).

The conflicting views of the Seventh and Fourth Circuits on the fundamental nature of the writ of error *coram nobis* should be resolved by this Court so that the courtroom door will not be closed to victims of unjust convictions.

II. THE SEVENTH CIRCUIT'S NEW AND RESTRICTIVE STANDARD FOR THE GRANTING OF *CORAM NOBIS* RELIEF IS CONTRARY TO THE TEACHINGS OF THIS COURT AND IS IN CONFLICT WITH THE PRACTICES OF OTHER COURTS OF APPEALS

A. THE COURT OF APPEALS DISREGARDED THE HOLDINGS OF THIS COURT AND OTHER CIRCUITS THAT 1) AN ARGUABLY VALID INDICTMENT CANNOT IMMUNIZE SUBSEQUENT MISCARRIAGES OF JUSTICE FROM A *CORAM NOBIS* CHALLENGE, AND 2) THERE IS A FUNDAMENTAL VIOLATION OF DUE PROCESS WHEN A JURY IS PERMITTED TO CONVICT WITHOUT FINDING ANY CRIMINAL CONDUCT.

The Seventh Circuit held that Keane could be denied *coram nobis* relief because the indictment could be read to allege a valid mail fraud offense, even though it was conceded that the presentation of the government's case and the jury instructions did not require the jury to find the essential element of a scheme directed at money or property.

The Seventh Circuit's position is in direct conflict with the decisions of this Court. First, this Court does not permit the language of an indictment to immunize subsequent fundamental defects in the prosecution. Second, this Court holds that due process is violated where it cannot be determined with certainty that a guilty verdict actually was based on a violation of the law. The Seventh Circuit's refusal to follow the teachings of this Court puts it in conflict with the practices of other circuits.

The seminal modern case on *coram nobis, United States* v. *Morgan*, 346 U.S. 502 (1954), itself, did not involve a challenge to the indictment. The writ was granted on the basis of subsequent deprivation at trial of the right to competent counsel. This Court held that *coram nobis* is available whenever there are "circumstances compelling such action to achieve justice." 346 U.S. at 511.

Following *Morgan*, other circuits grant *coram nobis* on grounds unrelated to the validity of the indictment. Newly discovered evidence — not a defective indictment — was the basis for *coram nobis* relief in *Hirabayashi* v. *United States*, 828 F.2d 591 (9th Cir. 1987). Improperly secured guilty pleas justified *coram nobis* petitions in cases such as *Holloway* v. *United States*, 393 F.2d 731 (9th Cir. 1968) and *Roberts* v. *United States*, 158 F.2d 150 (4th Cir. 1946).

Put plainly, the Seventh Circuit's narrow focus on the language of the indictment is but another formula for its view that a jury instruction permitting conviction for conduct that is not illegal does not constitute an "error of the most fundamental character."

The Fourth Circuit rejected this position in its decision in *United States* v. *Mandel, supra*. In *Mandel*, as in *Keane*, the government attempted to read belatedly into the indictment various theories of mail fraud that could have been used in a prosecution conforming to the requirements of *McNally*. The Fourth Circuit, however, applied the same standard used by this Court in *McNally* regarding erroneous jury instructions: "Although the Government now relies in part on the assertion that the petitioners obtained property . . . there was nothing in the jury charge that required such a finding." (App., *infra*, 36a), citing *McNally*, 107 S.Ct. at 2882). In *Mandel*, as in *Keane*,

> "the jury was quite free, and indeed instructed, to return a guilty verdict solely on the theory that the [government entity] had been denied the 'faithful and loyal services of public officials.' " (App., *infra*, 35a).

Accordingly, the Fourth Circuit recognized that "the jury instructions were insufficient and the convictions for mail fraud cannot be upheld under *McNally* standards." (App., *infra*, 36a).

Unsuccessfully arguing on the basis of the Seventh Circuit's *Keane* decision, the government argued in *Mandel* to the Fourth Circuit that "granting a writ of error *coram nobis* is improper where the change in the law did not vitiate the criminality of the petitioners' conduct but only brings into question the propriety of the jury instructions." (App., *infra*, 38a). The government's

argument based on *Keane* was rejected by the Fourth Circuit. *Coram nobis* relief was granted in *Mandel* because "the jury instructions in this case improperly allowed petitioners' convictions for acts which are not within the reach of the mail fraud statute." (*Id.*).

The Fourth Circuit's position is correct. Whether or not the trial was tainted by a fundamental error depends on whether the case presented to the jury and the instructions *necessarily required* the jury to find the essential element of a scheme directed at a deprivation of money or property. The prosecution in *McNally* itself was defective because "there was no charge and the jury was not required to find that the Commonwealth itself was defrauded of any money or property." 107 S.Ct. at 2882.

The prosecution of Keane was not presented to the jury in a manner which comported with the *McNally* requirements for mail fraud. The Seventh Circuit's own opinion concedes that the "intangible rights approach" was the "centerpiece" of the trial. (App., *infra*, 11a). And the jury was explicitly permitted to convict Keane without making the essential finding required by *McNally*. The jury was instructed erroneously that a scheme to deprive the public "of the honest and loyal services of a public official may come within the meaning of scheme and artifice as set forth in the mail fraud statute." (RP 3414). Thus the jury was not *required* to find Keane guilty of conduct violating the mail fraud acts. (App., *infra*, 11a). Such a conviction is fundamentally flawed.

In denying *coram nobis* relief, the Seventh Circuit has disregarded the fundamental teachings of this Court concerning due process in criminal trials. This Court consistently has held that due process will not tolerate a conviction tainted by doubt as to whether the verdict was based upon a proper legal standard. As recently as the decision in *Mills* v. *Maryland*, 108 S.Ct. 1860, 1866 (1988), this Court has reiterated that

> "the Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict."

To the same effect is *Stromberg* v. *California,* 283 U.S. 359 (1931). *Stromberg* does not place the burden on the defendant to demonstrate the most probable basis for the jury's reasoning. If it is likely that a properly instructed jury would have reached a different verdict, the conviction is irremediably tainted. And in this case the Seventh Circuit itself concedes that "[a] jury instructed as *McNally* requires might have acquitted him." (App., *infra,* 12a).

The Seventh Circuit stands alone in its refusal to apply this constitutional standard to post-*McNally* cases. In *Mandel, supra,* the Fourth Circuit, rejecting the Seventh Circuit's position, cited *Mills* as support for its holding granting *coram nobis* relief:

> "we hold that in a case in which the jury considers alternate theories of liability, we must reverse the convictions if either theory is an improper basis for punishment." (App., *infra,* 35a).

Similarly, other circuits have granted *habeas corpus* relief [2] for a constitutionally defective conviction where the jury had been instructed, contrary to *McNally,* that a conviction could be based solely on a scheme directed at intangible rights to good government. *Ingber* v. *Enzor,* 841 F.2d 450, 456 (2nd Cir. 1988) (citing *Stromberg* v. *California); United States* v. *Shelton,* 848 F.2d 1485, 1495-7 (10th Cir. 1988) (indictment adequate but instructions did not require the jury to find a scheme directed at pecuniary deprivation). Relief also has been given by the First Circuit in a post-*McNally* direct appeal, where the instruction was remarkably similar to the one given in *Keane. United States* v. *Ochs,* 842 F.2d 515, 525 (1st Cir. 1988). In all of these cases the conviction could not stand where the jury was invited to convict without finding the essential element of a mail fraud scheme.

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[2] The respective applicability of *coram nobis* or *habeas corpus* depends on whether the petitioner is still in "custody"; however, the nature of the remedy and the standards applicable are essentially the same. *United States* v. *Morgan,* 346 U.S. 502, 506, n. 4 (1954); *United States* v. *McCord,* 509 F.2d 334, 340, n. 6 (D.C. Cir. 1974); *United States* v. *Mandel,* App., *infra,* 25a-54a); *Cf. United States* v. *Little,* 608 F.2d 296, 299 (8th Cir. 1979); *United States* v. *Travers,* 514 F.2d 1171, 1173, n. 1 (2nd Cir. 1974); *United States* v. *Scherer,* 673 F.2d 176, 178 (7th Cir. 1982).

The First, Second, Fourth and Tenth Circuits do not share the Seventh Circuit's willingness to disregard this Court's holdings in *Stromberg* and *Mills*. Unlike the Seventh Circuit, they all follow this Court's teachings that a conviction is fundamentally defective if it is not certain that guilt was proven to the jury.

The Seventh Circuit's denial of *coram nobis* relief in this case cannot be reconciled with the teachings of this Court as to the scope of *coram nobis* relief or the requirements of due process. Its position is in conflict with the other circuits which continue to follow the mandate of this Court.

B. THE SEVENTH CIRCUIT'S NEW TEST FOR *CORAM NOBIS* RELIEF DISREGARDS THIS COURT'S DECISIONS WHICH HOLD THAT PERSISTING ADVERSE CONSEQUENCES ARE PRESUMED TO FLOW FROM A WRONGFUL CONVICTION.

The second reason given by the Seventh Circuit for denying Keane *coram nobis* relief was the assertion that Keane no longer suffers any collateral consequences from his felony conviction.

This Court has held that it must be *presumed* that adverse collateral consequences *necessarily* flow from a criminal conviction. *United States* v. *Morgan*, 346 U.S. 502, 512-13 (1954), identifies as a collateral consequence of conviction the fact that "*[s]ubsequent convictions may carry heavier penalties.*" (emphasis added). Ironically, the Seventh Circuit's opinion adverted to this rule, before ignoring it, when it noted that "the writ is valuable to bring an end to what may be substantial civil disabilities attached to criminal convictions . . . . criminal convictions also may lead to enhanced penalties for future offenses." *United States* v. *Keane, supra,* (App., *infra,* 7a).

In *Sibron* v. *New York,* 392 U.S. 40 (1968), this Court refused to find that a criminal conviction had become moot after the completion of the prison term. Rather, the Court stated the presumption that collateral consequences are the inevitable continuing effect of a criminal conviction. Discussing the prior holding in *Pollard* v. *United States,* 352 U.S. 354 (1957), this

Court reiterated that it had "abandoned all inquiry into the actual existence of specific collateral consequences and in effect presumed that they existed." 392 U.S. at 55. It found that this presumption was justified as an acknowledgement of

> "the obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences. The mere 'possibility' that this will be the case is enough to preserve a criminal case from ending 'ignominiously in the limbo of mootness.' " (*Id.*).

Following the command of this Court, other circuits consistently have held that the mere possibility of greater future sentencing as a past-offender constitutes sufficient civil disability to justify *coram nobis* relief. *E.g., United States* v. *Travers,* 514 F.2d 1171 (2nd Cir. 1974); *Hirabayashi* v. *United States,* 828 F.2d 591 (9th Cir. 1987).

In deciding this case, the Seventh Circuit expressly acknowledged that it was rejecting the Ninth Circuit's view of the standards for *coram nobis* relief, as expressed in *Hirabayashi.*

Hirabayashi was a petition for *coram nobis* relief to vacate a 1942 misdemeanor conviction for violating World War II legislation requiring Japanese Americans to remain within their residences and to report to civil control stations. In the four decades after his wrongful conviction, petitioner pursued an academic career. At the time of the petition he was 69 years old, and a Professor Emeritus of Sociology. There was no suggestion that he had been or ever would be a "recidivist". Even so, the Ninth Circuit recognized the applicability of *Morgan* and *Sibron,* and held that the need for *coram nobis* relief was not moot. It ruled that the district court correctly found that "a judge could take the convictions into account when sentencing Hirabayashi if he were ever convicted of another crime" as well as the further finding that the wrongful conviction might be used to impeach Hirabayashi's credibility in some jurisdictions. 828 F.2d at 605.

The Seventh Circuit did not attempt to refute the Ninth Circuit's reasoning in *Hirabayashi.* It limited itself to a quasi-sarcastic mischaracterization of the Ninth Circuit's position:

> "we deline to adopt the Ninth Circuit's apparent view that anybody may obtain coram nobis just to bask in the satisfaction of having his position vindicated. *Hirabayashi* v. *United States,* 828 F.2d 591 (9th Cir. 1987)." (App., *infra,* 8a).

The Seventh Circuit's lack of concern for the consequences of being unjustly marked as a convicted felon also is contrary to the position of other circuits. In *United States* v. *Mandel, supra,* the Fourth Circuit took a position squarely contrary to the Seventh Circuit on this point:

> "Without *coram nobis* relief, the petitioners, who contested their guilt at each stage of the proceeding, would face the remainder of their lives *branded as criminals* simply because their federal trial occurred before rather than after the Supreme Court's ruling in *McNally*." (App., *infra,* 38a-39a) (emphasis added).

Keane's petition is not based merely on his desire to vindicate his name — although he is shackled unjustly with the label of "convicted felon". Keane suffers continuing civil disabilities from his conviction. For example, 18 U.S.C. §922 imposes various prohibitions on persons convicted of crimes punishable by imprisonment of more than one year which effectively bar Keane from acquiring any firearm or ammunition. Like Hirabayashi, Keane remains subject to the risk of enhanced sentencing if he ever were convicted for any other offense, and perhaps may be impeached on the basis of his felony conviction.

Effectively, the Seventh Circuit has taken the position that, among the persons who were unjustly convicted and completed a term of incarceration, the only persons entitled to relief are those who can demonstrate affirmatively that they are likely to commit crimes that will return them to prison! This viewpoint should not be countenanced. *Coram nobis* is a remedy for all those who were wrongfully convicted. It is not a special reward reserved for the criminal underclass.

C. *CORAM NOBIS* RELIEF SHOULD NOT BE DENIED BECAUSE THE PETITIONER'S ARGUMENTS AGAINST HIS MAIL FRAUD CONVICTION HAD BEEN REJECTED BY THE TRIAL COURT AND THE COURT OF APPEALS YEARS BEFORE THE VERY SAME ARGUMENTS WERE ADOPTED BY THIS COURT IN *MCNALLY*.

Finally, the Seventh Circuit suggests that Keane is not entitled to *coram nobis* relief because "the legal contention Keane presents was raised . . . after the opportunity to ventilate all arguments." (App., *infra*, 12a). The Seventh Circuit contends that *coram nobis* "was and is not a device to relitigate issues fully ventilated at the time of the conviction," (App., *infra*, 6a).

No citation is given for this postulate. It is contrary to the law as followed in other circuits. In *United States* v. *Travers*, 514 F.2d 1171 (2nd Cir. 1974), the Second Circuit granted *coram nobis* relief after this Court had reinterpreted the law, even though the issue had been raised and wrongfully decided on the first appeal, stating "[i]t was simply Travers' bad luck that no conflict of decisions had yet developed when he unsuccessfully applied for certiorari from our decision . . . " 514 F.2d at 1176.

The Fourth Circuit in *Mandel* expressly cited *Travers* as the basis for granting *coram nobis*. (App., *infra*, 37a). It agreed with the Second Circuit that *coram nobis* should be granted "in light of a retroactive dispositive change in the law of mail fraud." (*Id.*). Like Keane and Travers, the *Mandel* defendants had raised unsuccessfully the arguments that ultimately were adopted by this Court. In *Mandel*, the government urged the Fourth Circuit to follow the Seventh Circuit's position in *Keane*, by denying relief on the basis of "fully ventilated" arguments. (App., *infra*, 50a-51a, Reply brief). The Fourth Circuit refused to do so.

The Seventh Circuit's position is unsupported and totally contrary to the law. More than a dozen years ago the trial court, as well as the Seventh Circuit itself, erred in permitting Keane's conviction. Keane should not be denied justice because his arguments were ahead of their time.

III. *CORAM NOBIS* RELIEF SHOULD NOT BE RESTRICTIVELY CURTAILED BECAUSE THE CORRECTION OF INJUSTICE IS THE HIGHEST FUNCTION OF THE JUDICIAL SYSTEM.

Finally, this Court should grant certiorari to emphasize that the correction of fundamental injustice is a priority worthy of the expenditure of judicial effort.

The *Keane* opinion announces that the Seventh Circuit's restrictive view of *coram nobis* is motivated by concerns about docket control. The Seventh Circuit states that "[f]rom a systemic perspective, time consumed relitigating one case subtracts from the time available to litigate others." (App., *infra*, 4a). The opinion is preoccupied with the concept that "we live in a world of scarcity, one in which that most inflexible commodity, time itself, sets a limit on our ability to prevent and correct mistakes." (App., *infra*, 12a).

The Seventh Circuit does not deny that its viewpoint will result in the perpetuation of injustice. Nonetheless, its priorities place a higher value on limiting the caseload than rectifying "erroneous convictions." (*Id.*).

The Seventh Circuit concedes that its restrictions on *coram nobis* mean that "Keane must bear the emotional weight and public obloquy of conviction even though a jury instructed as *McNally* requires might have acquitted him." (*Id.*). The Seventh Circuit recognizes that Keane already has been forced to spend time "in prison, where perhaps he did not belong." The only solace given to Keane is the trite maxim that "[b]ygones are beyond recall." (*Id.*)

The Seventh Circuit's judicial clock-watching argument is devoid of any factual support for its implied dread of being overwhelmed by *coram nobis* cases. The injustice done to Keane certainly is not unique—as *Mandel* and other cases demonstrate. Nonetheless, a review of the cases raising post-*McNally* collateral attacks on mail fraud convictions in the past year and a half demonstrates that only a limited number of such convictions can be successfully challenged. Not all mail fraud prosecutions were so uniquely tied to solely "the intangible right to good

government" theory. *See United States* v. *Runnels,* 833 F.2d 1183, 1185-7 (6th Cir. 1987)

The placing of judicial ease above the duty to do justice is unseemly and unworthy of our judicial system. Keane has suffered for more than a dozen years one of the greatest wrongs imaginable under the rule of law — the "black mark" (App., *infra*, 8a) of being a "convicted felon," even though no jury ever was required to find that he had violated the law.

Judicial econometrics should not take precedence over justice. The maxim *fiat justicia, ruat coelum*—let there be justice even though the heavens tumble—should take precedence over the old saw, "let bygones be bygones." This Court must reaffirm a standard for *coram nobis* relief that unhesitatingly fulfills the judiciary's function of providing justice whenever there has been "an error of the most fundamental character."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January, 1989

APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

No. 87-3030

UNITED STATES OF AMERICA,

Respondent-Appellee,

v.

THOMAS E. KEANE,

Petitioner-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 74 CR 359—**Bernard M. Decker**, *Judge.*

ARGUED JUNE 3, 1988—DECIDED JULY 5, 1988

Before EASTERBROOK and MANION, *Circuit Judges*, and GORDON, *Senior District Judge.**

EASTERBROOK, *Circuit Judge.* Thomas E. Keane, once the Chairman of the Finance Committee of Chicago's City Council, was convicted of mail fraud. The indictment, using the "intangible rights" theory minted in *United States v. Isaacs*, 493 F.2d 1124, 1149 (7th Cir. 1974), charged that Keane defrauded the people of Chicago out of their right to his honest services. Keane was convicted in October 1974 and served his sentence between April 1976 and Feb-

* Honorable Myron L. Gordon, Senior District Judge for the Eastern District of Wisconsin, sitting by designation.

ruary 1978. He was released from parole in February 1980. The Supreme Court of Illinois restored his license to practice law in 1984, *In re Keane*, 102 Ill. 2d 397, 466 N.E.2d 208 (1984). In 1987, the year Keane turned 80, the Supreme Court held that the mail fraud statute, 18 U.S.C. §1341, does not prohibit schemes to deprive employers of their agents' faithful services. *McNally v. United States*, 107 S. Ct. 2875 (1987). Keane immediately filed this petition for a writ in the nature of coram nobis, see 28 U.S.C. §1651(a), asking the district court to vacate the judgment of conviction and order the Treasury to return the fine of $27,000. The district judge who had conducted the trial in 1974 denied the application, 678 F. Supp. 708 (N.D. Ill. 1987), concluding that Keane's acts are mail fraud even under *McNally*.

The indictment charged, and the evidence showed, see *United States v. Keane*, 522 F.2d 534, 539-44 (7th Cir. 1975), *cert. denied*, 424 U.S. 976 (1976), that Keane—one of Chicago's most influential political figures—and two of his friends formed a partnership that acquired more than 1,800 parcels of land. The partnership acquired the land from the City at property-tax-delinquency auctions; it held the land through an Illinois land trust, a device that permits beneficial owners of land to conceal their interests. Armed with knowledge about the City's (and other governmental bodies') plans, Keane told his partners what parcels to bid on. The original owners had two years to redeem their land by paying the taxes; after this redemption period passed, Keane used his position as Chairman of the Finance Committee to help the partnership obtain clear title to the parcels. The tax sale left in place any "special assessments": charges for neighborhood sewers, roads, and the like. Payments of these assessments flowed to a special assessment fund—which financed public improvements by issuing bonds, and to which the bondholders looked for repayment. If the landowners did not pay the full assessments (as Keane's partnership did not) the City Council would authorize sale of the land at auction with the proceeds applied to the special assessments.

The Finance Committee would recommend a minimum price, usually 30% of the assessment due; the Council regularly approved the Finance Committee's recommendations. Keane induced the Finance Committee to set a reserve bid of 10% of the amount of the special assessments outstanding on the parcels his partnership owned; the City Council approved; its members did not know of Keane's interest in the parcels receiving this special treatment.

After the auctions the partnership held fee simple title to more than 1,000 of the original 1,800 parcels. Keane then induced his friends in public agencies to buy these parcels. Some went to the Chicago Housing Authority, some to the Metropolitan Sanitary District, some to smaller instrumentalities. The indictment charged and evidence showed that the prices for some parcels were inflated and that the partnership made more than $160,000 in profits; Keane contended, and a state court later concluded, *Chicago ex rel. Cohen v. Keane*, 105 Ill. App. 3d 298, 434 N.E.2d 325 (1st Dist. 1982), that the partnership lost money on the whole shebang. The jury was told that it need not find that Keane made a profit in order to convict him; it was enough, the instructions said, if Keane acted in an official capacity without telling anyone about his private interest, depriving the City and its residents of the candor and faithfulness required of a fiduciary.

Keane objected before, during, and after trial to the "intangible rights" aspect of the indictment and jury instructions. The district court in 1974, and this court in 1975, disagreed with his position; the Supreme Court in 1976 denied Keane's petition for a writ of certiorari. If this were an ordinary civil case Keane would have to swallow his losses. *United States v. Stauffer Chemical Co.*, 464 U.S. 165 (1984). Everyone is entitled to a full and fair opportunity for litigation, and no one is entitled to multiple opportunities. The decision the second time around is not necessarily more accurate than the first and comes at great cost to legitimate interests in finality—not only the interests of the prevailing party but also the interests

of the judicial system. Rules of preclusion induce parties to concentrate their energies and resources on getting things right the first time. Cf. *Wainwright v. Sykes*, 433 U.S. 72, 88-89 (1977). The prospect of relitigation would reduce the effective stakes of the first case, leading to an erosion in accuracy. From a systemic perspective, time consumed relitigating one case subtracts from the time available to litigate others. Litigants must wait in a longer queue, receive less judicial attention, or both. It would not be possible to stop with two decisions; if hindsight shows the error of the first decision, it may show error of the second in turn. The high costs of multiple decisions in the same case have led the Supreme Court to conclude that a party does not get a second chance even if an intervening decision of that Court makes pellucid the error of the original decision. *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981). Given *Moitie*, there can be no doubt that if in a civil case Keane had been found liable for fraud and assessed $27,000 as damages, a later decision of the Supreme Court rejecting the reasoning used in his case would not have entitled him to a fresh adjudication.

For more than half of Keane's life, the same approach would have been employed in criminal litigation. The writ of habeas corpus supplied an avenue of collateral attack, but only in the event the court rendering the judgment of conviction was without jurisdiction to do so. See Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963). Through the first part of this century judges became increasingly inventive in classifying errors as "jurisdictional" until, in *Brown v. Allen*, 344 U.S. 443 (1953), the Supreme Court held that a constitutional error could support issuance of the writ even if the trial court unquestionably had jurisdiction. Congress codified *Brown* in 1966 by amending 28 U.S.C. §2254, and the parallel statute for federal prisoners, 28 U.S.C. §2255, establishes the same scope of review as §2254. *United States v. Hayman*, 342 U.S. 205, 219 (1952). Both statutes, however, deal with persons "in

custody", and their relaxation of the finality rules is justified by the ongoing deprivation of liberty. A fresh look may prevent the imposition of unjustified, yet continuing, punishment. A criminal defendant fined but not imprisoned is not suffering an ongoing punishment and may not attack his sentence under these statutes. *Wright v. Bailey*, 544 F.2d 737, 739 & n.2 (4th Cir. 1976) (collecting cases). Once a defendant has been released from prison and relieved of civil disabilities, even a collateral attack begun during confinement becomes moot, showing that only the continuing interference with a liberty interest justifies relitigation. *Lane v. Williams*, 455 U.S. 624 (1982). Civil disabilities (collateral consequences) may prevent a challenge begun during imprisonment from becoming moot on release, *Sibron v. New York*, 392 U.S. 40 (1968), but civil disabilities alone are not "custody" authorizing collateral litigation. *Westberry v. Keith*, 434 F.2d 623 (5th Cir. 1970) (fine and revocation of drivers' license do not add up to custody).

The norm of finality, with an exception while custody or another deprivation of liberty continues, is the background for understanding the writ of error coram nobis. Judgments are not final on the day when rendered; our legal system gives parties some period within which to seek reconsideration, a privilege that was especially important before the modern institution of appellate review. Many final judgments were not appealable. The permissible time within which to seek rehearing customarily was the "term of court"—a period that lasted until the judges moved on to some other city (or, in metropolitan courts, for a few months). This produced erratic results, for some judgments were rendered on the last day of the term and others evaded rehearing because the events justifying that relief were unknowable before the end of the term. The writ of error coram nobis developed as a run 'round the end-of-term limitation, one applicable to civil and criminal cases alike. It was justified not by special considerations attending loss of liberty but by perceived limitations of the reconsideration process in all litigation. See *United*

States v. Morgan, 346 U.S. 502 (1954) (tracing the history of the writ).

Because frequent use of such a writ would discard the benefits of finality, it has been reserved for compelling events. Its descendent in civil cases, Fed. R. Civ. P. 60(b)(6), authorizes reopening a judgment more than a year after its entry only in unusual circumstances, and even then the denial of relief may be upset only if no reasonable person could have taken the position adopted by the district court. *Metlyn Realty Corp. v. Esmark, Inc.*, 763 F.2d 826, 830-33 (7th Cir. 1985). The writ was, if possible, harder to obtain in criminal cases. Claims that could have been raised by direct appeal are outside the scope of the writ. *United States v. Mayer*, 235 U.S. 55, 69 (1914).

> As applied to criminal cases, the writ was used to raise claims that were not apparent from the face of the record and understandably not raised at trial (e.g., that the uncounseled defendant was insane at the time of the plea or that the defendant had entered the guilty plea out of fear of mob violence). The range of cognizable claims is somewhat broader today in many jurisdictions, but the writ is still generally limited to claims that rest on facts dehors the record.

Yale Kamisar, Wayne R. LaFave & Jerold H. Israel, **Modern Criminal Procedure** 1468 (6th ed. 1986). The writ of error coram nobis is limited to defects that sap the proceeding of any validity, see *Mayer; United States v. Addonizio*, 442 U.S. 178, 186 (1979) (dictum); *United States v. Scherer*, 673 F.2d 176, 178 (7th Cir. 1982); *United States v. Dellinger*, 657 F.2d 140, 144 (7th Cir. 1981). It was and is not a device to relitigate issues fully ventilated at the time of the conviction. Section 2255 permits relitigation if the defendant is in custody and there is an intervening change of law. See *Davis v. United States*, 417 U.S. 333 (1974); *Sanders v. United States*, 373 U.S. 1, 15-17 (1963); *United States v. Mazak*, 789 F.2d 580 (7th Cir. 1986). The reason to bend the usual rules of finality is missing when liberty is not at stake. Courts must con-

serve their scarce time to resolve the claims of those who have yet to receive their *first* decision.

To the extent a petition for a writ of error coram nobis is a way to relitigate claims (as opposed to raising claims previously unavailable or litigated on an incomplete record), a petitioner must satisfy at least two other requirements. He must demonstrate that the judgment of conviction produces lingering civil disabilities (collateral consequences). He also must demonstrate that the error is the type of defect that would have justified relief during the term of imprisonment. Keane fails on both counts.

When holding in *Morgan* that coram nobis may be used to avoid federal criminal convictions, the Supreme Court observed, 346 U.S. at 512-13, that the writ is valuable to bring an end to what may be substantial civil disabilities attached to criminal convictions. These include loss of the rights to vote, hold occupational licenses (including law licenses), and bear arms; criminal convictions also may lead to enhanced penalties for future offenses. These future effects may call for a fresh look at the conviction. Just as a continuing civil wrong is not beyond redress because its genesis is old, see *Bazemore v. Friday*, 106 S. Ct. 3000, 3006-07 (1986), so the ongoing effects of a criminal conviction justify the allocation of the judicial resources necessary to take a fresh look. Criminal convictions sometimes produce financial penalties and diminish the reputation of the defendant, but these do not entail continuing legal effects of a judgment. Civil judgments frequently have the same effects, which do not authorize indefinite relitigation. Many courts therefore have held that coram nobis may be employed if and only if the petitioner is suffering civil disabilities unique to criminal convictions. E.g., *United States v. Hay*, 702 F.2d 572 (5th Cir. 1983); *Puente v. United States*, 676 F.2d 141, 145 n.2 (5th Cir. 1982). We agree with this approach, which reflects the rules of finality ordinarily applicable while appreciating that the special disabilities criminal convictions may bring justify additional scrutiny in an effort to curtail any lingering effects of error. (One case, *United States*

v. Lewis, 478 F.2d 835 (5th Cir. 1973), permitted use of the writ when the only stake was repayment of a fine, but the court did not discuss the propriety doing so, and passing by such a question in silence does not establish a precedent.)

Keane was disbarred after his conviction, and this sort of civil disability could support the issuance of the writ. The Supreme Court of Illinois readmitted Keane to practice in 1984, however. We inquired at oral argument whether Keane is under any disability today; counsel answered that he is not, and there is no realistic threat that Keane's conviction could produce any disability or detriment in the future. The conviction is a black mark, but that is not a civil disability, and we decline to adopt the Ninth Circuit's apparent view that anyone may obtain coram nobis just to bask in the satisfaction of having his position vindicated. *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987). A strong emotional interest is not enough to produce an Article III case or controversy, e.g., *Allen v. Wright*, 468 U.S. 737, 754-56 (1984), and a blot on one's escutcheon, divorced from any particular entitlement to a "clean record", does not even involve a liberty interest. Compare *Paul v. Davis*, 424 U.S. 693 (1976), with *Fleury v. Clayton*, No. 87-2545 (7th Cir. May 11, 1988). Litigation does not exist for its own sake; declamations by courts are not the objective of cases; there must be a concrete dispute about legal *entitlements* to justify a remedy. Cf. *Alliance to End Repression v. Chicago*, 820 F.2d 873, 876 (7th Cir. 1987). Keane was amerced $27,000, which gives him a stake sufficient to produce a "case or controversy", but the fine is no different from the award of damages in civil litigation. It is a sunk cost rather than a continuing disability producing additional injury as time passes. A civil judgment that Keane defrauded the City out of $27,000 would have produced both the reputational and financial injury Keane now suffers, but neither would have permitted reopening a judgment 12 years after it became final. Keane is not burdened by continuing disabilities that could justify

the investment of judicial time necessary to decide whether he is entitled to vindication.

We do not doubt that the return of a fine is permissible relief if a writ in the nature of coram nobis is otherwise justified, see *Pasha v. United States*, 484 F.2d 630 (7th Cir. 1973); *Neely v. United States*, 546 F.2d 1059 (3d Cir. 1976). We hold only that the prospect of getting money back is not enough by itself to support belated review. To the extent *United States v. Mandel*, 672 F. Supp. 864 (D. Md. 1987), holds that the government's retention of a fine is a civil disability justifying issuance of the writ, we do not agree with it. There may be a further obstacle, the need to find statutory authority for repayment, which otherwise would be blocked by sovereign immunity. The Little Tucker Act, 28 U.S.C. §1346(a)(2), permits district courts to award sums of $10,000 or less; Keane wants $27,000, which only the Claims Court may award. The Tucker Act (big and small) also is limited to claims founded on the Constitution, statute, regulation, or contract. Keane does not contend that Congress is forbidden by the Constitution to treat as criminal the conduct in which he engaged, or that any statute requires the United States to give him $27,000. *McNally* holds only that the mail fraud statute does not cover a particular kind of behavior. Our conclusion that financial stakes do not adequately distinguish this from a routine civil matter makes it unnecessary to explore limits on the restitution of criminal fines, just as *United States v. Sams*, 521 F.2d 421 (3d Cir. 1975), avoided the same complex issue by declining on other grounds to issue the writ.

If Keane could clear all of these hurdles, he would face one final obstacle: even one still in custody may not obtain collateral review of every legal error. Surely relief to one out of custody is not available more readily than relief to one still serving his sentence. Section 2255 provides relief for a prisoner "claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States". *Davis* holds that if the indictment does not state

an offense, the resulting custody violates the laws of the United States. The Court observed, however, that a statutory law short of a "fundamental defect" that produces a "miscarriage of justice" may not be raised under §2255. 417 U.S. at 346, quoting *Hill v. United States*, 368 U.S. 424, 428 (1962); see also *United States v. Timmreck*, 441 U.S. 780 (1979); *Kramer v. Jenkins*, 803 F.2d 896, modified, 806 F.2d 140 (7th Cir. 1986). The failure of the indictment to state an offense may be raised at any time, because "conviction and punishment . . . for an act that the law does not make criminal", *Davis*, 417 U.S. at 346, is a paradigm miscarriage of justice. See also Fed. R. Crim. P. 12(b)(2). *Davis* shows that a change in law negating the presence of a crime may and must be applied retroactively on review under §2255. See also, e.g., *United States v. Shelton*, 1988 U.S. App. LEXIS 7095 (10th Cir. 1988) (en banc); *Ingber v. Enzor*, 841 F.2d 450, 453-54 (2d Cir. 1988).

McNally knocked out the prosecution's principal theory in Keane's case but does not establish that the indictment failed to state an offense. An indictment adverting principally to rights to faithful service still may lead to a valid conviction if the prosecution shows that the defendant defrauded someone out of property, including intangible property. *United States v. Wellman*, 830 F.2d 1453 (7th Cir. 1987). The indictment charges Keane with a scheme that had a substantial potential to take other people's property by fraud. It alleged, for example, that Keane used the City's confidential information about its plans for acquiring property. Valuable confidential information is a form of property, see *Carpenter v. United States*, 108 S. Ct. 316 (1987). It alleged that Keane induced the City Council to set a reserve price of only 10% of the special assessments, instead of the usual 30%, which could have reduced the fund's realizations. It alleged that Keane induced his friends to buy the parcels, on behalf of public agencies, for more than they were worth. Now it may well be that none of this cost the City or anyone else one red cent. The information may have been worthless; the

reduction in the reserve bids would have been immaterial if competition developed at the auctions (and it is in the bondholders' interests to ensure that the auctions are competitive); the efforts to sell the property for more than it was worth may have come to naught. These were jury questions and do not detract from the validity of the indictment. True, the victims (if any) would have been the special assessment bondholders and the taxpayers of the special districts (such as the Metropolitan Sanitary District) rather than the City Treasury. But the mail fraud statute proscribes fraudulent *schemes*; it does not confine penalties to those whose schemes succeed in raking off cash, a point no less valid today than when emphasized on direct appeal, see 522 F.2d at 545 (citing cases), and the statute does not limit the category of victims. (Keane argues as if defrauding one's employer is the only form of mail fraud, so that he is entitled to acquittal if the loss fell on the bondholders rather than the City.) Although phrased in terms of intangible rights to honest services, the indictment notified Keane of these aspects of the scheme, and much effort was spent at trial trying to figure out who, if anyone, was the poorer as a result of Keane's machinations.

We do not say that Keane's conviction would today be affirmed on appeal. The intangible rights approach was such a centerpiece of the trial that it would be difficult to conclude, as we did in *Wellman*, that a jury instructed as this one was **necessarily** found the existence of a scheme to defraud someone of "property" within the meaning of *McNally*, *Carpenter*, and, to cite only a few of our own recent cases, *Ward v. United States*, No. 87-2659 (7th Cir. May 10, 1988); *United States v. Eckhardt*, 843 F.2d 989 (7th Cir. 1988); *United States v. Holzer*, 840 F.2d 1343 (7th Cir. 1988); *United States v. Gimbel*, 830 F.2d 621 (7th Cir. 1987). As we have emphasized, however, and as Keane's lawyer conceded at oral argument, if the indictment states an offense, that is the end of things for relief in the nature of coram nobis. E.g., *United States v. Hobson*, 825 F.2d 364, 366 (11th Cir. 1987). Indeed, even one

count stating an offense would be the end of things, for a single felony conviction supports any civil disabilities and reputational injury Keane may have to endure. An error in the jury instructions—when a valid conviction could have been had under different instructions on at least one count of this 17-count indictment—is not the sort of fundamental defect that produces a complete miscarriage of justice. Without such a defect, there could not be relief even while imprisonment continued. There certainly should not be relief at some later date. Keane does not want an order setting his case for a new trial, with all the risks of fresh punishment that entails; he wants absolution without risk or cost. The judicial system cannot offer him a declaration that he did no wrong; we could do no more than say that the verdict in 1974 was tainted by error. A hunt for error, divorced from the possibility of a definitive answer, is not justifiable. All we can do now, all a court should do now, is inquire whether the indictment charged Keane with a crime. This indictment did.

To sum up, three independently sufficient reasons require the denial of relief in the nature of coram nobis. First, the legal contention Keane presents was raised and resolved adversely to him on a full record after the opportunity to ventilate all arguments; second, Keane is not under a civil disability as a result of his conviction; third, the indictment states an offense. We are acutely conscious that this leaves open the possibility that Keane must bear the emotional weight and public obloquy of conviction even though a jury instructed as *McNally* requires might have acquitted him. In a world of unlimited resources this would not happen. No one can accept without unease the thought that the legal system tolerates erroneous convictions. Yet we live in a world of scarcity, one in which that most inflexible commodity, time itself, sets a limit on our ability to prevent and correct mistakes. Every legal system tolerates a risk of error. It tries to find procedures that will hold error to a minimum, but then it must move on. Bygones are beyond recall. Nothing can

give Keane back the time he spent in prison, where perhaps he did not belong. The reopening of closed cases, though, means attention to bygones at the expense of others in need of initial adjudication. Poring over the records of old mail fraud cases—not only Keane's but also the many thousands of other cases decided under the intangible rights approach prior to *McNally*—would divert untold judicial hours from pressing business. At some point the judicial system must close old files and turn to the future, regretfully accepting the risk of error lest the quest for perfect justice become the enemy of adequate justice. That time has come for Mr. Keane.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

October 17, 1988

Before

Hon. FRANK H. EASTERBROOK, CIRCUIT JUDGE

Hon. DANIEL A. MANION, Circuit Judge

Hon. MYRON L. GORDON, Senior District Judge*

UNITED STATES OF AMERICA,
Respondent-Appellee,

No. 87-3030 *v.*

THOMAS E. KEANE,
Petitioner-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 74 CR 359

Bernard M. Decker, *Judge*

Order

Petitioner-Appellant filed a petition for rehearing and suggestion of rehearing en banc on August 2, 1988. All of the judges on the panel have voted to deny rehearing. After a poll of the judges in regular active service, the suggestion of rehearing en banc fails. Judges Cudahy and Ripple voted to hear this case en banc. Judge Flaum did not participate in the consideration or decision of this case.

The petition for rehearing is denied.

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*Honorable Myron L. Gordon, Senior District Judge for the Eastern District of Wisconsin, sitting by designation.

UNITED STATES OF America, Plaintiff,

v.

Thomas E. KEANE, Defendant.

No. 74CR359.

United States District Court,
N.D. Illinois, E.D.

Dec. 7, 1987.

Helene L. Greenwald, Asst. U.S. Atty., Chicago, Ill., for Government.

Jerome H. Torshen, James K. Genden, Torshen, Schoenfield & Spreyer, Ltd., Chicago, Ill., for defendant.

MEMORANDUM OPINION
AND ORDER

DECKER, District Judge.

On October 9, 1974, Alderman Thomas E. Keane ("Keane") was convicted of mail fraud and conspiracy to commit mail fraud. Nearly thirteen years later, in an unrelated case, *McNally v. United States*, ___ U.S. ___, 107 S.Ct. 2875, 97 L.Ed.2d 292 the United States Supreme Court held that the mail fraud statute does not prohibit schemes to defraud citizens of their "intangible rights" to honest and impartial government. Keane now petitions for a writ of error *coram nobis*, and requests that his conviction be vacated and his record expunged.

I. *Factual Background*

On May 2, 1974, a twenty-one-count indictment was returned against Keane alleging mail fraud, in violation of 18 U.S.C. § 1341, and conspiracy to commit mail fraud, in violation of 18 U.S.C. § 371. ¶ 12 of the indictment accused Keane of devising and intending to devise "a scheme and artifice to defraud":

> (a) The City of Chicago and its citizens and THOMAS E. KEANE'S fellow Aldermen on the Council of the City of Chicago of their right to the conscientious, loyal, faithful, disinterested and unbiased services, decisions, actions and

performance of official duties by defendant THOMAS E. KEANE, in his official capacities as 31st Ward Alderman and as Chairman of the Committee on Finance of the City Council, free from corruption, partiality, wilful omission, bias, dishonesty, official misconduct, conflict of interest and fraud;

(b) The City of Chicago and its citizens, and THOMAS E. KEANE'S fellow Aldermen on the Council of the City of Chicago, of their right to have the City's business and its affairs conducted honestly, impartially, free from deceit, craft, trickery, corruption, fraud, undue influence, dishonesty, conflict of interest, unlawful obstruction and impairments, and in accordance with the laws of the State of Illinois and the City of Chicago, which said scheme and artifice to defraud is set forth more fully below.

¶¶ 13-31 of the indictment alleged the substantive details of the scheme. Based on the jury's verdict, the court convicted Keane on seventeen of twenty mail fraud counts, and on the conspiracy count. The Court of Appeals affirmed the conviction as to fourteen of the mail fraud counts, and also upheld the conviction for conspiracy. *United States v. Keane,* 522 F.2d 534 (7th Cir.1975), *cert. denied,* 424 U.S. 976, 96 S.Ct. 1481, 47 L.Ed.2d 746 (1976). Keane paid a fine, served a term of incarceration, and was subsequently released. The Seventh Circuit's opinion includes a comprehensive discussion of the facts underlying this case. The court now recapitulates the important facts, and notes the respective paragraphs of the indictment in which they were alleged.

Keane participated secretly in a scheme to purchase tax delinquent properties in Cook County, arrange for the Chicago City Council ("Council") to remove encumbrances thereon, and then engineer the City of Chicago's ("City") acquisition of many of these properties.

First, Keane established land trusts with several partners as a front for his investment. Indictment, ¶¶ 13-18, 22-24. In June and July, 1966, the trust purchased 1,878 parcels of tax delinquent property at a total cost of $208,543. 522 F.2d at 540; Indictment,

¶ 21. Next, Keane had to remove the special assessment liens on the properties.[1] Indictment, ¶¶ 25-28. It was thus necessary to cause foreclosure proceedings to be instituted by the City in the Circuit Court of Cook County. It was up to a subcommittee of the Council Finance Committee, which Keane chaired, to set the minimum bid, and in practice the court would approve the minimum bid as the price of the lien. 522 F.2d at 540. One of Keane's partner's discussed their need for foreclosures with the chairman of the subcommittee, who subsequently held a meeting on June 26, 1970. Although, prior to this meeting, the chairman had traditionally set minimum bids at thirty percent or more of the principal due, almost all of the thirty-two parcels in which Keane had an interest were assigned minimum bids of about ten percent. *Id.*, at 540-541.[2] Chairman Keane submitted these minimum bids (as well as Compromise Offers) to the full Council for approval and voted on them without ever disclosing his personal interest. *Id.*, at 541.

In the final phase of the scheme, Keane engineered the sale of the properties, typically to a governmental agency of the City. Indictment, ¶¶ 29-31. In May, 1968, Keane voted in the Council to authorize the Chicago Housing Authority ("C.H.A.") to purchase certain properties notwithstanding the fact that he had an equitable interest in them. 522 F.2d at 542. One of Keane's partners testified that Keane called the Chairman of C.H.A., Charles Swibel, and requested him to buy some of the properties. C.H.A. eventually bought sixty parcels. *Id.* C.H.A. also acquired five parcels as purchasing agent for the Chicago Dwelling Association ("C.D.A."). C.D.A. requested the purchase because it was Charles Swibel's wish. *Id.* C.D.A. obtained the lots even though they were not in an area approved by the Council, they

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[1] Special assessments finance local improvements, such as alleys and sewers, which benefit the adjacent properties. The adjacent property owners pay into a special assessment fund ("the fund"), which is used to redeem the bonds issued to contractors. 522 F.2d at 540.

[2] In the case of properties whose special assessment bonds had already been redeemed by the fund, the subcommittee used a standard formula to assign a "Compromise Offer in Lieu of Foreclosure" ("Compromise Offer"). 522 F.2d at 541.

were improperly zoned, and their per unit cost was more than twice that C.D.A. normally paid. *Id.*

With respect to 102 other parcels in which Keane had an interest, the Metropolitan Sanitary District ("M.S.D.") threatened to to condemn them and offered $150 per parcel. M.S.D. representatives met with Keane and indicated than the top appraisal was $700 per parcel. M.S.D. ultimately purchased the lots for $775 per parcel. 522 F.2d at 542. In addition, Keane voted in the Council to authorize the Department of Urban Renewal ("D.U.R.") to purchase property where Keane and his partners owned thirty parcels. The Government introduced evidence that Keane had purchased the parcels originally only because he had inside information about an impending D.U.R. project. *Id.*, at 542-543; Indictment, ¶¶ 19-20. Keane also obtained inner-office correspondence of the Park District to facilitate sales to that agency in 1972. 522 F.2d at 543. Finally, Keane and his partners sold some properties to private parties as well. *Id.* The Government introduced evidence that the partnership's sale of the properties yielded a gross profit of $167,471.30. *Id.* Keane countered with evidence that he sustained a net loss of $26,032.07. *Id.*, at 544.

In giving its instructions to the jury, the court discussed the substance of the scheme alleged in the indictment, and stated, *inter alia*,

> It is not necessary, however, that the City of Chicago was actually defrauded by the scheme or suffered a monetary loss, nor is it necessary that the Government must prove all of the pretenses, representations and acts charged in the indictment. I should add that it is not necessary, however, not only that the City of Chicago was not actually defrauded or suffered a monetary loss but also so far as the citizens or any agency of the City of Chicago, it is not necessary to show that they suffered a monetary loss.

Trial Transcript ("Transcript") at 3420.

II. *Discussion*

18 U.S.C. § 1341 provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do [uses the mails or causes them to be used], shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Federal prosecutors have long used this statute to bring to justice public officials at all levels of government who abuse the public trust for personal gain. Recently, however, in *United States v. McNally*, ___ U.S. ___, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), the Supreme Court undercut the theoretical foundation on which many prosecutions, including the instant case, have been built.

In *McNally*, one of the defendants became chairman of the Kentucky state Democratic Party, and thus obtained *de facto* control over selecting the state's insurance agent. He continued the state's relationship with a particular company in exchange for that company's sharing of its commissions with certain other companies, including one in which the chairman had an ownership interest. 107 S.Ct. at 2877. In affirming the conviction (*United States v. Gray*, 790 F.2d 1290 (6th Cir.1986)), the Sixth Circuit relied on the theory that § 1341 proscribes schemes to deprive citizens of their "intangible rights" to honest and impartial government. 107 S.Ct. at 2879. The Supreme Court reversed, holding that "[t]he mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government." *Id.*

Keane now contends that because he was tried for the deprivation of intangible rights, his conviction is a nullity.[3] The Government maintains, basically, that under the laws of agency,

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[3] As appears to be the case in *McNally*, 107 S.Ct at 2882, Keane's conspiracy count piggybacks on his conviction for mail fraud. Therefore, the former will stand or fall with the latter.

Keane's loyal service as an alderman was itself a valid property right, that survives *McNally,* and therefore the conviction should stand. Keane replies that the Government has been searching desperately for a lower court to narrow *McNally,* and thus, the Government has submitted its generic brief that would magically transform all intangible rights into the Supreme Court's notion of substantial property.

The Supreme Court stated that words "to defraud" " 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.' " 107 S.Ct. at 2880-2881 (quoting *Hammerschmidt v. United States,* 265 U.S. 182, 188, 44 S.Ct. 511, 512, 68 L.Ed. 968 (1924)). *McNally* is bound to leave lower courts somewhat bewildered. The citizens of Kentucky were "deceived," and this deception was for the "deprivation of something of value." Nevertheless, the scheme as a whole did not constitute mail fraud. To the extent the Kentucky scheme involved property—as the Supreme Court defines this term—*McNally* serves to tighten up the concept of "victim." That is, to constitute fraud, the entity to be deceived must *also* be the entity that is to part with property.[4] Therefore, there was no mail fraud proved in *McNally* because the entity deceived—the citizenry of Kentucky—was not deprived of property, and the entity deprived of property—the insurance company—although arguably extorted or "shaken down," was not, in the strict sense of the word, deceived. 107 S.Ct. at 2882.

Although *McNally* does not recognize the deprivation of "intangible rights" as fraud, neither does it foreclose prosecution for the deprivation of so-called "intangible property." *See Carpenter v. United States,* ___ U.S. ___, 108 S.Ct. 316, 98 L.Ed.2d 275 (1987). In *Carpenter,* petitioners were convicted, in part, of mail fraud for misappropriating prepublication information of The Wall Street Journal regarding impending stock market activity. They used this information to buy and sell securities

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[4] Since the gravamen of the statutory offense is a "scheme to defraud," it was unnecessary the Government to allege or prove that the victim of the scheme was actually defrauded or suffered a loss. *See United States v. George,* 477 F.2d 508, 512 (7th Cir.), *cert. denied,* 414 U.S. 827, 94 S.Ct. 155, 38 L.Ed.2d 61 (1973).

for their own personal gain. In upholding the convictions, the Court stated that

> . . . the object of the scheme was to take the Journal's confidential business information—the publication schedule and contents of the "Heard" column—and its intangible nature does not make it any less "property" protected by the mail and wire fraud statutes. *McNally* did not limit the scope of § 1341 to tangible as distinguished from intangible property rights.

Id., at ____, 108 S.Ct. at 320. *See also Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001-1004, 104 S.Ct. 2862, 2871-2873, 81 L.Ed.2d 815 (1984) (confidential business information is property for purposes of Fifth Amendment's Takings Clause).[5]

[1] The court is faced initially with the limited question of whether Keane's indictment expressly charged an actual offense. The Government has raised the question, discussed in *Runnels* and *Mandel*, of whether the fiduciary duty of an agent is the property right of his principal. However, the court need not reach it here because the indictment charged, and the evidence showed, that Keane schemed to deceive the citizenry and to deprive it of what is unquestionably property: money and/or confidential government information.

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[5] Without seeking leave of the court to cite additional authority, the Government brought "to the Court's attention" *United States v. Runnels*, 833 F.2d 1183 (6th Cir.1987). In *Runnels*, a lawyer bribed a union official to refer union members to his practice for workers' compensation claims. The Sixth Circuit upheld the official's conviction, despite an "intangible rights" instruction, by reasoning that the official's loyalty as a fiduciary of the union was was the union's property, and the bribe thus represented an "economic benefit" of which the union was defrauded. An even more recent case to the contrary is *United States v. Mandel*, 672 F.Supp. 864 (D.Md.1987). There, the governor of Maryland took bribes to influence racetrack legislation, and, along with five co-defendants, was convicted of mail fraud on an "intangible rights" instruction. To prevent the issuance of a writ of error *coram nobis*, the Government argued in part that the bribe money "belonged to the State under a constructive trust-type theory." *Id.*, at 877. District Judge Smalkin rejected this theory on the grounds that it was never argued to the jury, and vacated the conviction.

When having purchased the land parcels, Keane obtained extraordinarily low minimum-lien-foreclosure bids from his own Council committee, submitted them to the full Council, and voted to approve them without disclosing his direct, pecuniary interest, he deceived the citizenry to deprive it of money.[6] The Government alleged this portion of the scheme in ¶¶ 13-18, 21-28 of the indictment. As the Court of Appeals found,

> . . . there can be no question that defendant's properties were treated preferentially, and thus Keane [sic] was voting to approve minimum bids applicable to his properties, while at the same time the City Council did not see fit to grant similar percentages to properties belonging to other members of the public.

522 F.2d at 548 n. 21. The Seventh Circuit also acknowledged that the scheme depended upon Keane's efforts to "affirmatively mislead" his fellow aldermen as to his personal interest. *Id.*, at 549.

¶¶ 19-20 of the indictment alleged that Keane made use of confidential government information in his selection of land parcels. The jury heard evidence of such misappropriation of information with respect to an impending D.U.R. project. 522 F.2d at 542-543. If Keane misappropriated inside information, he again deprived the citizenry of property, "intangible" though it might have been. *See Carpenter,* ___ U.S. ___, 108 S.Ct. at 320.

[2] The indictment further charged that, to consummate his scheme, Keane used inside information, and secretly pressured various City agencies and officials into purchasing his properties. *See* Indictment, ¶¶ 29-31. The evidence showed that in the case of the sales to C.D.A. in particular, Keane pressured officials into buying parcels that were improperly zoned, grossly over-priced, and outside the area approved by the Council. 522 F.2d

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[6] Although the special assessment fund, into which foreclosure bids were paid, did not strictly involve funds of the City, the fund itself was a tool of the City's, and, therefore, property of the citizenry. 522 F.2d at 540, 550.

at 542, 551. As in the case of the foreclosure bids, Keane also voted in the Council, to authorize City purchases of his own properties, without disclosing his interest in them. Thus, in disposing of the parcels, as well as in obtaining them, Keane deceived the citizenry to deprive it of money, and thereby defrauded it of property, as charged in the indictment. Furthermore, the possibility that Keane sustained a net loss from the entire scheme is immaterial to his guilt. § 1341 proscribes merely using the mails pursuant to a fraudulent scheme, whether or not the scheme is successful. *George,* 477 F.2d at 512. Keane's shortcomings as a "businessman" do not cleanse him of criminal culpability.

Finally, it is necessary to consider the effect, if any, of the court's now erroneous jury instruction on intangible rights. The United States District Court for the District of Massachusetts faced a similar dilemma in the wake of *McNally. See United States v. Doherty,* 675 F.Supp. 726 (D.Mass.1987). In *Doherty,* several of the defendants, who were Massachusetts policemen, devised a scheme to steal police examinations from the Commonwealth, and to sell them to policemen seeking promotions. With respect to the mail fraud count (the defendants were indicted for various offenses), the court instructed the jury, *inter alia,* that "[t]he object of the scheme need not be money or any form of tangible property." *Id.,* at 732. Nevertheless, the purpose of the scheme had been to deprive the Commonwealth of property: the examinations *per se,* as well as money raises to be paid to fraudulently promoted officers. *Id.,* at 735-36. As the *Doherty* court observed, in gauging the impact of *McNally* on the guilty verdict,

> It borders on the absurd . . . to infer as to these defendants that the jury—necessarily accepting the government's evidence in order to find each of the elements charged beyond a reasonable doubt—nevertheless disbelieved the equally probative evidence that an essential concomitant of these schemes was that the Commonwealth would be defrauded of money or property in accordance with the dictates of *McNally.*

Id., at 735. Therefore, the *Doherty* court found its intangible rights instruction "harmless beyond a reasonable doubt." *Id.*

[3] Similarly, in the instant case, the jury's verdict that Keane violated the citizenry's rights to loyal service necessarily contained an implicit finding that Keane deprived the citizenry of property. The indictment, in ¶¶ 13-31, as well as the jury instructions, Transcript at 3407-3411, defined Keane's disloyalty as a scheme to defraud the City of property. The court was careful, both at the outset of the trial *and* in giving its instructions, to explain the details of the scheme alleged in the indictment. Transcript at 57-63, 3407-3411. Despite the "intangible rights" instruction, the jury, as instructed, could have convicted Keane only if it believed beyond a reasonable doubt that Keane schemed to defraud the citizenry of (1) money payable to redeem special assessment liens on the properties he acquired, Transcript at 3409-3410; (2) inside information regarding impending government projects, Transcript at 3408; and/or (3) money paid by various City agencies to Keane's partnership for its respective properties, Transcript at 3410-3411. The Government originally attempted to prove a deprivation of property by establishing Keane's civic disloyalty; it is readily apparent that the Government could only establish Keane's civic disloyalty by proving his scheme to defraud the citizenry of money and/or inside information. Therefore, the jury necessarily found a deprivation of property suffered by the entity deceived, and this would meet *McNally's* conception of fraud, as proscribed by the mail fraud statute.

The court's erroneous instruction on intangible rights was harmless beyond a reasonable doubt, and the conviction must stand. To vacate Keane's conviction in the wake of *McNally* would be to provide him with an unintended and unnecessary judicial windfall.

III. *Conclusion*

Keane's petition is denied.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-7027

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

MARVIN MANDEL, W. DALE HESS,
HARRY W. RODGERS, III,
WILLIAM A. RODGERS,
IRVIN KOVENS, and ERNEST N. CORY,

Defendants-Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Frederic N. Smalkin, District Judge. (CR-75-0822-S)

Argued July 26, 1988 Decided December 7, 1988

Before RUSSELL, WIDENER, and HALL, Circuit Judges.

Martin Stanley Himeles, Jr., Assistant United States Attorney (Breckinridge L. Wilcox, United States Attorney, on brief), for Appellant. Arnold Murray Weiner (M. Albert Figinski, Stuart R. Berger, William F. Gately, H. Thomas Howell, William G. Hundley, Thomas C. Green, Ernest N. Cory, Jr., on brief) for Appellees.

WIDENER, Circuit Judge:

The government appeals the granting of a writ of error *coram nobis* vacating the 10-year-old convictions of Marvin Mandel, former governor of Maryland, W. Dale Hess, Harry W. Rodgers, III, William A. Rodgers, Irvin Kovens and Ernest N. Cory (petitioners) for mail fraud and racketeering, We affirm the district court's decision which vacated the convictions and required the government to return to the petitioners all fines paid.

On November 24, 1975, a Special Grand Jury for the District of Maryland charged the petitioners in a 24-count indictment with mail fraud in violation of 18 U.S.C. § 1341 and prohibited racketeering activity in violation of 18 U.S.C. § 1961 et seq.[1] The indictment, in essence, charged the petitioners with participating in a mail fraud scheme involving gifts of clothing, jewelry and interests in land to support legislation that would be beneficial to the Marlboro Race Track, which Mandel's codefendants either owned or were interested in.[2]

Specifically, the 20 mail fraud counts of the indictment charged that, beginning between January 7, 1969 and the spring of 1971, and continuing until the filing of the indictment, petitioners devised and intended to devise a scheme and artifice:

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[1] 18 U.S.C. § 1961 provides in pertinent part:

> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprises' affairs through a pattern of racketeering activity or collection of unlawful debt.

[2] The panel's decision on direct appeal in this case, in some detail in *United States v. Mandel,* 591 F.2d 1347, 1353-57 (4th Cir. 1979), sets out the facts which the government alleged constituted the scheme.

(a) To defraud the citizens of the State of Maryland, and its governmental departments, agencies, officials and employees, both executive and legislative, of their right to the conscientious, loyal, faithful, disinterested and unbiased services, actions and performance of official duties of MARVIN MANDEL, in his official capacities as Governor of the State of Maryland, free from bribery, corruption, partiality, willful omission, bias, dishonesty, deceit, official misconduct and fraud;

(b) To defraud the citizens of the State of Maryland, and its governmental departments, agencies, officials and employees, both executive and legislative, of their right to have the state's business and its affairs conducted honestly, impartially, free from bribery, corruption, bias, dishonesty, deceit, official misconduct and fraud, and in accordance with the laws and Code of Ethics of the State of Maryland;

(c) To defraud the citizens of the State of Maryland, and its governmental departments, agencies, officials and employees, both executive and legislative, of their right to have available and to be made aware of all relevant and pertinent facts and circumstances when:

(1) drafting, considering and deliberating upon proposed legislation for the State of Maryland with respect to the Maryland horse racing industry and to other matters;

(2) administering the laws of the State of Maryland with respect to the Maryland horse racing industry and to other matters; and

(3) transacting business for and on behalf of the State of Maryland;

(d) To obtain, directly and indirectly, money, property and other things of value, by means of false and fraudulent pretenses, representations, and promises, and the concealment of material facts, relating to the Marlboro Race Track, the Bowie Race Track, the Security Investment Company, Ray's Point, Inc., and to other matters.

Count 21 of the indictment charged Mandel with acquiring and maintaining an interest in and control of the Security Investment Company through a pattern of racketeering activity that included mail fraud and bribery under Maryland law.[3] Count 23 charged Hess, Harry Rodgers and William Rodgers with conducting the affairs of the Security Investment Company through a pattern of racketeering activity that included bribery and mail fraud. The district court entered a judgment of acquittal on this count and it is not an issue here. Count 24 charged Hess, Harry Rodgers, William Rodgers, Kovens and Cory with conducting and participating in the conduct of the affairs of the Marlboro Race Track through a pattern of racketeering activity that included mail fraud.

Prior to trial, the petitioners moved to dismiss the indictment "arguing, *inter alia,* that the indictment fails to allege a cognizable scheme to defraud . . . ," *United States v. Mandel,* 415 F. Supp. 997, 1003 (D. Md. 1976), in that "the intangible rights allegedly defrauded by the scheme do not constitute 'something of value' whose deprivation can be punished under the mail fraud statute." The motion was denied, and the matter proceeded to trial on June 1, 1977.

The district court instructed the jury on August 9, 1977. The pertinent part of the mail fraud instruction was as follows:

> The words scheme or artifice, as used in the mail fraud statute, mean any plan or course of action intended to defraud others, *or* to obtain money or property by means of false or fraudulent pretenses, representations or promises.
>
> A statement or representation is false or fraudulent within the meaning of this statute if known to be untrue or made with reckless indifference as to its truth or falsity, and made or caused to be made with the intent to deceive.

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[3] Count 22 also charged Mandel with engaging in a pattern of racketeering activity, but was dismissed prior to trial. *Mandel,* 591 F.2d at 1352, n. 3.

A false or fraudulent representation may be made by statements or half-truths, or the concealment of material facts, as well as by affirmative statements or acts.

The mail fraud statute prohibits any scheme utilizing the mails that is reasonably calculated to deceive persons of ordinary prudence and comprehension.

A scheme to defraud, within the meaning of the statute, may be defined as the intentional use of false or fraudulent representations for the purpose of gaining a valuable undue advantage or working some injury to something of value held by another.

A citizen's right to have his Government conducted honestly and impartially, and to the faithful and loyal services of public officials, are things of value whose fraudulent deprivation may fall within the meaning of scheme to defraud as used in the mail fraud statute.

Additionally, a scheme to defraud public officials of information material to a decision which they are required to make in their official capacity may also come within the meaning of scheme to defraud as used in the mail fraud statute. (Emphasis added)

The petitioners specifically requested, but, upon objection by the government, the court declined to give, an instruction requiring the jury to find a scheme to defraud the State of money or property in order to convict on the mail fraud counts. See *United States v. Mandel,* 672 F. Supp. 864, 870 (D. Md. 1987).

The petitioners were each adjudged guilty of 15 counts of mail fraud under § 1341 and one count of prohibited racketeering activity under §§ 1961 et seq.[4] Mandel was sentenced to a four-

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[4] The jury, after 13 days of deliberation, in the middle of which it was given a modified *Allen* charge by the district court, returned verdicts of guilty against the appellees on all but three of the mail fraud counts. The jury returned verdicts of not guilty on counts 5, 6 and 14 (mail fraud) of the indictment. The district court entered judgments of acquittal as to counts 19 and 20 (mail fraud) of the indictment. Additionally, the jury returned verdicts of guilty on counts 21, 23 and 24 (racketeering) of the indictment. The district court entered a judgment of acquittal on count 23 of the indictment. *Mandel,* 591 F.2d at 1352, n. 3.

year prison term; Hess, Harry Rodgers and Kovens were each sentenced to four years' imprisonment and fined $40,000; William Rodgers was sentenced to 20 months' imprisonment and fined $40,000; and Cory was sentenced to 18 months' imprisonment. *Mandel,* 591 F.2d at 1352-53. Additionally, pursuant to 18 U.S.C. § 1963(a), Hess, Harry Rodgers, William Rodgers, Kovens and Cory were ordered to forfeit their ownership interest in the Southern Maryland Agriculture Association, Inc. (the holding corporation of the Marlboro Race Track), based on their convictions under count 24 of the indictment for racketeering. 591 F.2d at 1352, 1353.

Petitioners promptly appealed, claiming, among other things, that their convictions under the mail fraud statute constituted an unwarranted extension of the statute and an impermissible federal intrusion into the political affairs of the State of Maryland. *Mandel,* 672 F. Supp. at 870. Our panel decision found this claim without merit,[5] 591 F.2d at 1358, but held that there had been erroneous admission and exclusion of evidence and that the jury instructions on bribery were inadequate with regard to the mail fraud counts, 591 F.2d at 1365. We vacated the convictions and remanded for a new trial. 591 F.2d at 1376. On June 5, 1979, we reheard the matter *en banc,* and an equally divided court affirmed the district court's convictions. *United States v. Mandel,* 602 F.2d 653 (4th Cir. 1979) (per curiam).[6] Mandel and his codefendants filed a petition for writ of certiorari

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[5] This was in line with earlier opinions of this court. See *United States v. Price,* 788 F.2d 234, 237 (4th Cir. 1986), *vacated* and *remanded, McMahan v. United States,* 483 U.S. ____, 55 U.S.L.W. 3870 (1987), *on rehearing United States v. Price,* No. 85-5040 (L) (Sept. 20, 1988).

[6] The entire opinion follows:

> The judgments of conviction are affirmed by an equally divided court.
>
> A majority of the members of the *en banc* court would affirm the judgments of conviction against all of the contentions of the appellants except the claim of error in the charge to the jury which was the point upon which there was equal division.

to the Supreme Court, and it was denied. *Mandel v. United States,* 445 U.S. 961 (1980).

All the petitioners have now served their sentences. Mandel served 19 months of his four-year sentence, the remainder being commuted. He also was disbarred because of his federal conviction. 672 F. Supp. at 871. Hess served 18 months of his three-year sentence, the remainder being commuted, and he paid a total of $40,000 in fines. Harry Rodgers and William Rodgers each served their prison terms, three years and a year and a day respectively, and they each paid $40,000 in fines. Kovens served his three-year term and paid a total of $40,000 in fines. Cory's 18-month term of imprisonment was suspended. 672 F.2d at 871.

Almost 10 years after petitioners were convicted and more than five years after they completed service of their sentences, the Supreme Court decided *McNally v. United States,* 55 U.S.L.W. 5011 (1987), holding that the mail fraud statute, 18 U.S.C. § 1341, does not protect against schemes to defraud persons of their intangible rights such as the right to honest government. Based on the Supreme Court's decision in *McNally,* the petitioners filed petitions for writs of error *coram nobis* in the district court in Maryland on August 13, 1987, to vacate their convictions and to require the government to return all fines paid and property forfeited. The district court issued its memorandum opinion and order granting the writs, vacating the petitioners' convictions and ordering that all fines be repaid.[7] From this order, the government took its appeal.

The federal mail fraud statutes were first enacted in 1872 as part of a recodification of the postal laws to protect citizens from the use of the mails in furtherance of schemes to defraud. See *Parr v. United States,* 363 U.S. 370, 389 (1960); *Durland v. United States,* 161 U.S. 306, 314 (1896). And in the 1970's, the lower federal courts began expanding the scope of the rights protected by § 1341 to include certain intangible rights such as

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[7] The district court order did not address petitioners' request that the forfeited property be returned. The parties have since resolved this issue by stipulation.

the voters' right to an honest election, *United States v. States*, 488 F.2d 761, 765 (8th Cir. 1973) *cert. denied*, 417 U.S. 909 (1974), the citizens' right to the loyal and faithful services of public officials, *United States v. Caldwell*, 544 F.2d 691, 696 (4th Cir. 1976), and employers' rights to the loyal and faithful services of their employees, *United States v. George*, 477 F.2d 508, 513 (7th Cir. 1973), *cert. denied*, 414 U.S. 827 (1973). However, the Supreme Court in *McNally*, 55 U.S.L.W. 5011, considerably narrowed the scope of the rights protected by § 1341.

McNally involved a kickback scheme in which James E. Gray, a former Kentucky official, and Charles J. McNally, a private individual, were charged in the indictment with devising a scheme "(1) to defraud the citizens and government of Kentucky of their right to have the Commonwealth's affairs conducted honestly, and (2) to obtain, directly or indirectly, money and other things of value by means of false pretenses and the concealment of material facts."[8] *McNally*, 55 U.S.L.W. at 5012. The indictment alleged that the petitioners and a third individual, Howard P. Hunt, received kickbacks from the State's workers' compensation insurance provider. Hunt was the chairman of the state Democratic Party and had *de facto* control over selecting the insurance agencies from which the State would purchase its policies.

In 1975, the State workers' compensation insurance provider, Wombwell Insurance Company of Lexington, Kentucky, agreed with Hunt to share any commissions in excess of $50,000 a year with other insurance agencies specified by Hunt, including payments to Seton Investment, Inc., which was controlled by Hunt and Gray and nominally owned and operated by McNally. Wombwell also paid commissions to Snodgrass Insurance Agency, which in turn gave money to McNally.

Hunt was charged with, and pleaded guilty to, mail and tax fraud and was sentenced to three years' imprisonment. The jury convicted Gray and McNally of both mail fraud and conspiracy, and the court of appeals affirmed. *United States v.*

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[8] Gray and McNally were also charged with conspiracy to violate the mail fraud statute and conspiracy to defraud the United States by obstructing the collection of federal taxes. *McNally*, 55 U.S.L.W. at 5013.

Gray, 790 F.2d 1290 (6th Cir. 1986). The Supreme Court granted certiorari and reversed the court of appeals. It held that § 1341 is "limited in scope to the protection of property rights." *McNally*, 55 U.S.L.W. at 5014. The Court noted that the jury in *McNally* was not required to find that the State itself was defrauded of any money or property or even that, absent the scheme, the State would have paid lower insurance premiums. Thus, the instructions on the mail fraud count "permitted a conviction for conduct not within the reach of § 1341." Permitting such a conviction, the Court held was error.

The Court rejected the line of courts of appeals' decision, holding that the mail fraud statute protects against schemes to defraud citizens of their intangible right to honest and impartial government. "The mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government." 55 U.S.L.W at 5013.

Petitioners argue, and we agree, that this case is indistinguishable from *McNally*, and, thus, the petitioners here were convicted for conduct we now know is "not within the reach of § 1341." 55 U.S.L.W at 5015.

The government asserts that the foundation for its mail fraud charge was the bribery of Mandel, and that under its theory of the case the jury necessarily found that Mandel received property in exchange for favorable treatment for the owners of Marlboro.[9] This argument confuses the requirements of the *McNally* decision. *McNally* does not allow a mail fraud conviction merely on the finding that those charged received *any* property in connection with the scheme; *McNally* requires a finding that the scheme *defrauded* or *intended to defraud* someone of money or property. 55 U.S.L.W. at 5014. As in *McNally*, a conviction

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[9] There is some doubt whether the jury was ever adequately instructed on the *quid pro quo* element of bribery. The Fourth Circuit panel reversed and an equally divided *en banc* court affirmed on this issue. See note 7 and accompanying text. In any event, whether or not the jury was properly instructed on the issue is immaterial, for, in the words of *McNally*, " . . .the jury was not required to find that the. . . [State of Maryland] itself was defrauded of any money or property." 55 U.S.L.W. at 5014.

here was permitted without a finding that the State was defrauded of money or property, only of the "conscientious, loyal, faithful, disinterested and unbiased services" of Marvin Mandel, in the very words of the indictment, substantially repeated in the jury charge.

In the alternative, the government contends the bribery scheme defrauded the State of Maryland of property under two separate theories. First, the government argues that the State was deprived of the bribes given Mandel, which belonged to the State under a constructive trust theory. Second, the State was deprived of the racing days allotted to the Marlboro Race Track in exchange for the bribes. We recognize that two cases subsequent to *McNally,* in which the juries were instructed on intangible rights, have upheld mail fraud convictions on similar theories. They are *United States v. Richerson,* 833 F.2d 1147 (5th Cir. 1987), and *United States v. Runnels,* 833 F.2d 1183 (6th Cir. 1987). Neither of those cases, however, is persuasive here.

Richerson was a conviction of conspiracy to commit mail fraud on account of a kickback scheme in which the defendant, in return for kickbacks, approved false invoices submitted by suppliers to his private employer. The jury was instructed in part, without objection, that the defendant had a duty to his employer not to conceal facts he had reason to believe were material and that such concealment would deprive the employer of the honest and loyal services of the employee. On appeal, the court affirmed the conviction, giving three alternate grounds. First, it held *McNally* did not apply to cases "involving employee fraud" of a private employer, 833 F.2d at 1147, thereby confining *McNally* to its facts, a scheme to defraud state citizens of their intangible rights to honest and impartial government. As an alternate ground, the court construed the district court's jury instruction as requiring a finding that the defendant breached his duty of loyalty through concealment of material information and held that such concealment affected his employer's property rights. 833 F.2d at 1157. The third alternate ground for affirmance was that, in any event, the error in the charge did not rise to the level of plain error because objection was not taken at trial. 833 F.2d at 1147. None of the grounds for affirmance relied upon in *Richerson* are present here. This is not a case of a private

employer; rather, the State of Maryland is involved just as was the Commonwealth of Kentucky in *McNally*. The jury charge given in this case did not require the finding that Mandel breached any duty affecting property rights; rather, it permitted a conviction, in the words of the jury charge, upon a finding that " . . . faithful and loyal service of public officials, are things of value whose fraudulent deprivation may fall within the meaning of scheme to defraud as used in the mail fraud statute." Plain error also does not enter into this case. Mandel has been making the same *McNally* objection to the indictment and charge in this case, directly or inferentially, ever since he was indicted in 1975.

Runnels was a case of conviction for mail fraud of a local union president, who, for a kickback, would refer workers' compensation claims to an attorney who was also a convicted defendant in the case. The Jury charge included an instruction on intangible rights, which the court of appeals acknowledged was erroneous, 833 F.2d at 1188, thus taking a different tack than the *Richerson* court. It held, however, that the conviction should be affirmed because the jury verdict necessarily demonstrated that the business agent, Runnels, did accept the payments and also because of its legal conclusion that such payments belonged to the union. The court acknowledged that it was affirming a criminal conviction on a theory not properly advanced at trial. 833 F.2d at 1183. *Runnels* also is not persuasive. Whatever the rule may be elsewhere, we hold that in a case in which the jury considers alternate theories of liability, we must reverse the convictions if either theory is an improper basis for punishment. *United States v. Mallas,* 762 F.2d 361, 363, n. 3 (4th Cir. 1985). The latest application of this rule that we find is in *Mills v. Maryland,* No. 87-5367, 56 U.S.L.W. 4503, 4506, ___ U.S. ___ (June 6, 1988). In order not to apply the rule, we must be able to say "with a high degree of probability" that the jury did not rely on the legally incorrect theory. *United States v. Alexander,* 748 F.2d 185, 189 (4th Cir. 1985). Such is not possible in this case, of course. As demonstrated, the jury was quite free, and indeed instructed, to return a guilty verdict solely on the theory that the State of Maryland had been denied the "faithful and loyal services of public officials." This was annunciated by the fact that the bribery instruction offered by the defendants,

requiring a finding that the State was defrauded of a money or property interest, was denied by the district court at the government's urging.

Even if the government's theories mentioned just above may be proper subsequent to *McNally,* they are not at issue in this case because the jury was not instructed on them. See *McNally,* 55 U.S.L.W. at 5014-15: "Although the Government now relies in part on the assertion that the petitioners obtained property . . . there was nothing in the jury charge that required such a finding." In *Mandel,* there was one theory of the case before the jury which would alone permit conviction, that the State of Maryland and its citizens were defrauded of the honest and faithful services of Mandel, and this was sufficient to convict the petitioners of mail fraud. *Mandel,* 672 F. Supp. at 869. In fact, as we have noted, the court, at the government's urging, specifically rejected an instruction offered by the petitioners requiring for conviction a finding that the State was defrauded of some money or property interest.

Thus, the jury instructions were insufficient and the convictions for mail fraud cannot be upheld under *McNally* standards.[10] Nor may the convictions for racketeering be upheld.

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[10] *Accord: United States v. Price,* No. 85-5040 (4th Cir. September 20, 1988); *United States v Ochs,* 842 F.2d 515 (1st Cir. 1988); *United States v. Holzer,* 840 F.2d 1343 (7th Cir. 1988); *United States v. Murphy,* 836 F.2d 248 (6th Cir. 1988); *United States v. Gordon,* 836 F.2d 1312 (11th Cir. 1988); *United States v. Gimbel,* 830 F.2d 621 (7th Cir. 1987); see also *United States v. Covino,* 837 F.2d 65 (2d Cir. 1988).

Carpenter v. United States, 56 U.S.L.W. 4007, ___ U.S. ___ (1987), is not to the contrary. In *Carpenter,* a reporter for the Wall Street Journal, whose column had an impact on the stock market, conspired with a stock broker for pre-publication release of the column to the broker, which enabled the broker to take advantage of the forthcoming impact of the column on the market. The Court held that the column and the information in it were the property of the Wall Street Journal and that its intangible nature did not make it any less property protected by the mail fraud statute than tangible personal property. It was not the same, the Court decided, as a scheme to defraud citizens of their intangible rights to honest and impartial government. 56 U.S.L.W. at 4009. While the Court described the Journal's right to the reporter's honest and faithful service as an interest "too ethereal in itself to fall within the protection of the mail fraud statute," the object of the scheme was to take the Journal's confidential business information, as well as its publication right, intangible property rights, and turn them over without authority to the broker. Thus, the Court distinguished "intangible property rights" from "intangible rights to honest and impartial government." 56 U.S.L.W. at 4009.

Count 24 of the indictment, as noted earlier, charged all the petitioners, except Mandel, with violation of the RICO statute premised solely on the mail fraud offenses. Since none of the underlying offenses of mail fraud remain viable after *McNally,* the racketeering convictions under count 24 also must be vacated. See *United States v. Truglio,* 731 F.2d 1123, 1132 (4th Cir. 1984) *cert. denied,* 469 U.S. 862 (1984). While count 21 charged Mandel with criminal violation of RICO premised not only on the mail fraud charges but also on two alleged acts of bribery in violation of Maryland law, it too must be set aside. If one of two predicate offenses underlying a substantive RICO count is vacated, the RICO count also must be vacated. *United States v. Joseph,* 781 F.2d 549, 554 (6th Cir. 1986). And, since we may not know whether the mail fraud or the bribery charges of Count 21, or both, were considered by the jury, that conviction also must be vacated. See *Mallas,* supra; *United States v. Holzer,* 840 F.2d 1343, 1352 (7th Cir. 1988).

Based on this analysis, it is clear to us that if this case before us on direct appeal we would be required to overturn all the convictions. The issue here, however, is whether *coram nobis* relief is appropriate in this case. We think that it is required in order to achieve justice.

In *United States v. Morgan,* 346 U.S. 502 (1954), the Supreme Court established that federal courts have the power under the All-Writs Act, 28 U.S.C. § 1561(a) to grant a writ of error *coram nobis* to vacate a conviction after the sentence has been served.[11] The Court held that the extraordinary remedy should be issued, however, "only under circumstances compelling such action to achieve justice." 346 U.S. at 511. An error "of the most fundamental character" must have occurred to warrant issuing the writ, and no other remedy may be available. We follow the Second Circuit, which, in an opinion by Judge Friendly, has specifically allowed the granting of a writ of error *coram nobis* in light of a retroactive dispositive change in the law of mail fraud. *United States v. Travers,* 514 F.2d 1171 (2d Cir. 1974).

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[11] See *Morgan,* 346 U.S. at 507-11, for the history of the development of the writ of error *coram nobis.*

The petitioners in this case have served their sentences. They appealed their cases at each stage of the proceeding. They have no other remedy available other than a writ of error *coram nobis*. Based on the Supreme Court's ruling in *McNally*, the jury instructions in this case improperly allowed petitioners' convictions for acts which are not within the reach of the mail fraud statute.

The government argues, however, that granting a writ of error *coram nobis* is improper where the change in the law did not vitiate the criminality of the petitioners' conduct but only brings into question the propriety of the jury instructions. See *United States v. Keane*, 852 F.2d 199 (7th Cir. 1988). The government urges that society's interest in the finality of criminal convictions requires us to look beyond the improper instructions to the record to determine if adequate evidence of criminal activity existed on which to base a conviction under post-*McNally* standards. In essence, the government asks this court to review the evidence and decide what a jury would or might have found if the instructions had been proper, or, to put it more bluntly, it asks us to convict the defendants of crimes with which they were not charged. This, we decline to do. The sufficiency of the evidence in a case is a question in each instance to be submitted to a jury, subject only to being set aside for insufficiency. *United States v. Caudle*, 758 F.2d 994, 997 (4th Cir. 1985). We are not organized to decide if the petitioners are bad men or even if they have committed crimes. Our function is to decide whether or not, under the law, they are guilty of the crimes as charged in the indictment, and we decide that they are not.

Petitioners were tried and convicted under § 1341 and, thus, also of prohibited racketeering activities under 18 U.S.C. §§ 1961 *et seq.* for acts the Supreme Court has held are not within the reach of the federal mail fraud statute. Without *coram nobis* relief, the petitioners, who contested their guilt at each stage of the proceeding, would face the remainder of their lives branded as criminals simply because their federal trial occurred before rather

than after the Supreme Court's ruling in *McNally*.[12] See *Travers*, 514 F.2d at 1178-79.

Accordingly, the district court's granting of the writ and its order that the government return any fines in connection therewith[13] is

AFFIRMED.[14]

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[12] "Conviction of a felony imposes a *status* upon a person which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities." *Parker v. Ellis*, 362 574, 593-94 (1960) (Chief Justice Warren dissenting).

[13] The propriety of the court's order requiring the return of any fines paid in connection with these convictions is not at issue in this case because the government has stipulated that "vacating the criminal convictions would result in restitution of any criminal fines in connection therewith . . . . " 672 F. Supp. at 867, n. 2.

[14] The dissent deserves two comments.

First, a substantial part of its distinguishing of *United States v. Travers*, 514 F.2d 1171 (2nd Cir. 1974), which is substantially on all fours with our case here, consists of this statement: "Clearly, this is a situation where justice compels issuance of the writ because Travers had committed no crime." Dissenting op. p. 5. This conclusion by the dissent is contrary to the *Travers* opinion which states that: "Travers, to be sure, engaged in criminal conduct, but not in the crime for which he was convicted." 514 F.2d at 1179.

Second is its reliance on *United States v. Keogh*, 391 F.2d 138, 148, (2d Cir. 1968), for the reasoning that "The government is simply unlikely to allocate its prosecutorial resources to retry a defendant who will not be resentenced." Dissenting op. p. 3. That statement from *Keogh* has no application here. The defendant in *Keogh* contested by *coram nobis* admissibility of evidence and procedural irregularities claimed to be of constitutional dimension and would have been tried the second time for the same crime he had been tried and sentenced for the first time around, and which sentence had been served. Here, Mandel, et al, may not be tried for the same crime. The Supreme Court has made that clear in *McNally*.

Thus, the dissent's treatment of the Second Circuit opinions, both of which have bearing on our case, fails in each instance.

HALL, Circuit Judge, dissenting:

Because the majority misperceives the proper standard of review for writs of error *coram nobis,* and because this misperception leads to an improper result in this case, I must respectfully write in dissent.

I.

I have no quarrel with the majority's rendition of the facts or with its analysis concerning the effect of *McNally v. United States,* 55 U.S.L.W. 5011 (1987), on the substantive law of mail fraud. There is no doubt that were these convictions before this court on direct appeal, they would have to be overturned. However, they are not. Appellants have already fully litigated their positions and have already had the benefit of direct appellate review. *United States v. Mandel,* 591 F.2d 1347 (4th Cir. 1979) (vacating the convictions and remanding for a new trial); 602 F.2d 653 (4th Cir. 1979) (en banc) (reinstating the convictions and affirming the district court), *cert. denied,* 445 U.S. 961 (1980). This is a collateral attack through the extraordinary means of a writ of error *coram nobis.* The distinction between the review appropriate in these two very different types of proceedings is given wholly inadequate consideration by the majority and although treated more extensively by the court below, is applied incorrectly.

It has been black letter law since the Supreme Court recognized the coram nobis writ in *United States v. Morgan,* 346 U.S. 502 (1954), that a reviewing court should grant the writ "only under circumstances compelling such action to achieve justice." *Id.* at 511. Coram nobis should be granted only "to correct errors of the most fundamental character where the circumstances are compelling to achieve justice." *Correa-Negran v. United States,* 473 F.2d 684, 685 (5th Cir.), *cert. denied,* 414 U.S. 870 (1973).

The reason this rigorous burden of proof is placed on a coram nobis petitioner is obvious. All collateral attacks significantly, and detrimentally, impact on society's interest in the finality of criminal convictions.

> Inroads on the concept of finality tend to undermine confidence in the integrity of our procedures. Moreover, increased volume of judicial work associated with the processing of collateral attacks inevitably impairs and delays the orderly administration of justice. Because there is no limit on the time when a collateral attack may be made, evidentiary hearings are often inconclusive and retrials may be impossible if the attack is successful.

United States v. Addonizio, 442 U.S. 178, 184 n.11 (1984) (citations omitted) (habeas corpus); *quoted in United States v. Bellinger,* 657 F.2d 140, 144 (7th Cir. 1981) (coram nobis); *see also United States v. Keane,* 852 F.2d 199, 201 (7th Cir. 1988). This impact is amplified in a coram nobis petition. Unlike the habeas situation where there exists a significant incentive for the government to retry a successful petitioner so that he must serve out his sentence, in the coram nobis context,[1] the likelihood of retrial and the corresponding vindication of society's interest in preserving a valid conviction is greatly diminished. *United States v. Keogh,* 391 F.2d 138, 148 (2d Cir. 1968). The government is simply unlikely to allocate its precious prosecutorial resources to retry a defendant who will not be resentenced. *Id.* Thus, while it is clear that coram nobis and habeas corpus are roughly "similar" proceedings, *United States v. Travers,* 514 F.2d 1171, 1173 n.1 (1974); *United States v. Little,* 608 F.2d 296, 299 (8th Cir. 1979) ("substantially equivalent"), it is even more clear that the burden on a coram nobis petitioner is, and properly should be, greater than that placed on a habeas petitioner. Coram nobis petitions that attempt to overturn convictions in which the petitioner has fully and exhaustively litigated his position should be granted only in the most egregious cases, where circumstances make clear that justice cannot tolerate letting the conviction stand. To grant coram nobis relief more freely would spawn

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[1] My discussion of coram nobis addresses only the situation when the writ is sought after the petitioner's sentence has been served. Obviously, much of my analysis would not apply to writs sought before a petitioner begins to serve his sentence. *See* 3 C. Wright, *Federal Practice and Procedure: Criminal* § 592 at 430 n.15 (1982).

criminal "re"-litigation without end. *Keane, supra,* at 206. Consequently, it is with these considerations in mind that we should review petitioner's convictions.

II.

Four criteria must be met before coram nobis relief is appropriate;

(1) a more usual remedy is not available;

(2) valid reasons exist for not attacking the conviction earlier;

(3) adverse consequences exist from the conviction sufficient to satisfy the case or controversy requirement of Article III; and

(4) the error is of the most fundamental character. *Hirabayashi v. United States*, 828 F.2d 591, 604 (9th Cir. 1987).

The government concedes that because petitioners have served their sentences, a more usual remedy is not available; that because *McNally* was just recently decided, petitioners could not have contested their convictions any earlier; and, that sufficient adverse consequences remain from petitioners' convictions to create a valid controversy for the purposes of Art. III. Both the court below and the majority have also concluded that the error present in this case is so fundamental that justice compels that these convictions be set aside. Both put great weight on the Second Circuit's decision in *United States v. Travers,* 514 F.2d 1171 (1974). Both are mistaken.

In *Travers,* the petitioner was convicted of mail fraud for his involvement in a counterfeit credit card scheme. The *only* actions alleged by the government to have violated 18 U.S.C. §§ 1341, 1342 were the defrauded merchants' mailing of the credit card receipts for the purpose of collecting for the goods and services purchased with the counterfeit cards. After Travers had served his sentence, the Supreme Court decided *United States v. Maze,* 414 U.S. 395 (1974), holding that such mailings, made after the fraudulent use of the credit card has taken place, are not a part of a fraudulent credit card scheme because they occur after the scheme has reached fruition. *Id.* at 402. Therefore, the

Travers court found coram nobis relief appropriate in a case where the intervening change in law left *no* grounds for sustaining the conviction. Clearly, this is a situation where justice compels issuance of the writ because Travers had committed no crime. The *Travers* court expressly recognized this when it acknowledged that "Travers was convicted and punished for an act that the law does not make criminal," and observed that "there was *no* sufficient evidence to support this conviction. *Id.* at 1176, 1178 (quotations omitted) (emphasis added). Plainly, the *Travers* situation is not present here.

The government advances two valid theories as to why petitioners' conduct is criminal even in light of *McNally*. The first posits that the state was deprived of the bribes given Mandel, which rightfully belonged to the State under a constructive trust.[2] At least three circuits have recognized this theory. *United States v. Richerson,* 833 F.2d 1147 (5th Cir. 1987); *United States v. Runnels,* 833 F.2d 1183 (6th Cir. 1987); *Ingber v. Enzor,* 841 F.2d 450 (2d Cir. 1988). The second contends that the State was deprived of control over the allocation of the racing days that were shifted to the Marlboro Race Track in exchange for the bribes. These racing days are in essence a license to operate a very profitable business that produces significant revenues for the state.[3] Neither the majority nor the court below found these theories invalid. Rather, both ruled that they were not relevant because the jury was not specifically instructed on them. However, they are relevant, extremely relevant, because this is not a direct appeal. This is a petition for coram nobis relief. If either of these theories is valid, which both are, and if there is sufficient evidence to support the verdict, which there clearly is, then the petitioners are guilty of conduct still illegal under the mail fraud statute.[4]

---

[2] The total amount received by Mandel has been conservatively estimated at $380,000.

[3] In 1978, 558 total racing days brought in revenues for the state of Maryland in excess of 20.7 million dollars.

[4] This Court's recent decision in *U.S. v. Price,* No. 85-5040 (4th Cir. September 20, 1988), is not to the contrary. There we held only that 18 U.S.C. § 1341 did not protect intangible rights such as good government or honest union management." *Id.* at 3. No alternate theories of culpability were even discussed, let alone rejected. The Supreme Court's recent decision in *Carpenter v. U.S.*, 108 S. Ct. 316 (1987), demonstrates that these alternate theories are completely compatible with *McNally*.

This distinguishes this case from *Travers* and drastically redirects the analysis necessary to overturn these convictions. Because petitioners conduct is still illegal under post-*McNally* law, they complain merely of the improper instructions given at their trial.

Those instructions were clearly faulty in that they allowed for conviction of petitioners without a specific finding that the government was defrauded of a property interest. However, they also described a scheme for which a valid post-*McNally* conviction could be had.[5] Furthermore, the evidence presented at trial was more than sufficient to sustain a verdict that the state had been deprived of property. I believe that for coram nobis purposes, this is more than sufficient to sustain these convictions.

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[5] The indictment, which was read to the jury, in part charged:

> (a) *To defraud the citizens of the State of Maryland,* and its governmental departments, agencies, officials and employees, both executive and legislative, of their right to the conscientious, loyal, faithful, disinterested and unbiased services, actions and performance of official duties of MARVIN MANDEL, in his official capacities as Governor of the State of Maryland, *free from bribery,* corruption, partiality, willful omission, bias, dishonesty, deceit, official misconduct and *fraud*;
>
> (d) *To obtain, directly and indirectly, money, property and other things of value, by means of false and fraudulent pretenses, representations, and promises, and the concealment of material facts,* relating to the Marlboro Race Track, the Bowie Race Track, the Security Investment Company, Ray's Point, Inc., and to other matters.

Likewise, the instructions also prominently mentioned property:

> The words scheme or artifice, as used in the mail fraud statute, mean any plan or course of *action intended to defraud others, or to obtain money or property by means of false or fraudulent pretenses, representations or promises. . . .*
>
> *A scheme to defraud, within the meaning of the statute, may be defined as the intentional use of false or fraudulent representations for the purpose of gaining a valuable undue advantage or working some injury to something of value held by another.*

Thus, the idea that petitioners had defrauded the state out of property, or a property interest, was presented to the jury. Either of the government's theories, *i.e.* the property lost was the bribes or the racing days, is compatible with these instructions.

The majority rejects this position, citing this Court's decision in *United States v. Alexander,* 748 F.2d 185, 189 (4th Cir. 1985), which held that when a jury considers alternate theories of liability, we must reverse the convictions if either theory is invalid unless we can say "with a high degree of probability" that the jury did not rely on the invalid theory. *Id.* at 189. I, of course, agree with this proposition and agree that in this case, a reviewing court could not ascertain with sufficient probability upon which theory the jury relied. However, a tenets of direct appellate review, do not apply in an identical fashion in coram nobis proceedings. Our role is not to reverse these convictions if they are in error, but to overturn them only if justice so compels.[6]

The majority characterizes the government's position in this case as an appeal to this Court to "look beyond the improper instructions to the record to determine if adequate evidence of criminal activity existed on which to base a conviction under post-*McNally* standards." Slip Op. 20. They rebuke that position as an attempt to ask this Court "to convict the defendants of crimes with which they were not charged." Nothing could be further from the truth. The government is merely asking us to exercise the appropriate level of review, to examine this case as a whole and determine whether the error committed is of such fundamental nature that justice requires us to overturn these convictions.

---

[6] Writs of coram nobis have traditionally been reserved for situations where there has been a complete breakdown in the legal system. In *Morgan,* the Supreme Court gave an illustrative list of such breakdowns: insanity of a defendant, a conviction on a coerced guilty plea, failure to advise of the right of counsel, prosecutorial misconduct, a conviction based on perjured testimony. *Id.* at 508-510. In fact, *Morgan* involved a 19-year old man who was not advised of his right to counsel and was convicted without any representation. Certainly, *Travers,* where a man was convicted for actions that were not illegal, also fits this mold. *Id.* at 511-512. These are the types of errors that justice compels a court to remedy through coram nobis. An erroneous instruction is simply not in this league, especially when there was manifest evidence present of the petitioners' guilt.

III.

Marvin Mandel, then governor of Maryland, took bribes totalling at least $380,000 to manipulate the workings of state government, which had been entrusted to him by the people of Maryland, to divert extremely valuable racing days to his cohorts. His motive, their motive, was profit—profit proven to be at the expense of the people of the state of Maryland. Although their trial included an erroneous jury instruction, the proceedings were replete with evidence of bribery and manipulation. Their actions were and are patently illegal. My sense of justice does not compel me to set aside these convictions. Therefore, I must respectfully dissent.[7]

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[7] Because I would uphold the mail fraud convictions that are the predicate acts for petitioners' RICO conviction under 18 U.S.C. § 1962, I would affirm the RICO conviction as well.

In The United States Court of Appeals For the Fourth Circuit

No. 88-7027

UNITED STATES OF AMERICA,

Appellant,

v.

MARVIN MANDEL,
W. DALE HESS,
HARRY W. RODGERS, III,
WILLIAM A. RODGERS,
IRVIN KOVENS
and
ERNEST N. CORY,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND,
AT BALTIMORE, MARYLAND

Honorable FREDERIC N. SMALKIN
UNITED STATES DISTRICT JUDGE

REPLY BRIEF

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* * * *

ARGUMENT

I. The Standard of Review Utilized By the District Court and Advocated by Appellees Exceeds the Appropriate Standard In A Coram Nobis Proceeding.

The preliminary issue in this *coram nobis* proceeding, although it is the issue appellees address last, is the appropriate standard of review. Appellees pay lip service to the difficult burden they must satisfy, but disregard the manner in which other courts have applied it. Instead, they attempt to minimize their burden in order to support their claim that they have satisfied it.

In their survey of *coram nobis* precedent, appellees continue to rely on cases in which convictions have been vacated due to an intervening change in the law that eliminated the evidentiary foundation for a conviction, rather than calling into question jury instructions. Appellees are forced to concede that there is no direct authority for granting *coram nobis* due to instructional error, Appellees' Brief at 54-55, but point to *dicta* in *Cardall v. United States,* 599 F. Supp. 912 (D. Utah 1984). *Cardall,* however, simply highlights their difficult burden. While the district court in *Cardall* implied that an erroneous instruction that "so infected the entire trial that the resulting conviction violates due process," *id.* at 916, would warrant *coram nobis* relief, the court found that the error there — an instruction that unconstitutionally directed the jury to presume that a person intends the usual consequences of his acts — was not sufficiently egregious to warrant relief. Thus the only authority appellees can cite for the district court's granting of *coram nobis* based on instructional error is a decision refusing to grant such relief although the instructional error was of constitutional magnitude.

Indeed, after appellees filed their brief the Seventh Circuit, in the first appellate decision considering the availability of *coram nobis* relief in light of *McNally*, soundly rejected appellees' view that instructional error warrants *coram nobis* relief. In *United States v. Keane,* No. 87-3030 (7th Cir. July 5, 1988) (Easterbrook, J.), a former Chicago City Councilman who had been convicted

in 1974 of mail fraud based on an intangible rights theory sought *coram nobis* relief. Keane was convicted as a result of a scheme pursuant to which a partnership in which he had an interest acquired property from the City at property tax delinquency auctions, while Keane, without disclosing his interest in the partnership, voted favorably on matters that affected it. The indictment charged Keane with defrauding the people of Chicago of their right to his honest services, Slip op. at 1, and the jury was instructed accordingly. Keane was convicted, sentenced to a term of incarceration and fined $27,000. Well after he completed service of his sentence and was released from parole, the Supreme Court decided *McNally* and Keane, no longer in custody, sought *coram nobis*. The court, relying on the paramount interest in the finality of judicial determinations and the absence of the countervailing considerations that exist when a convicted defendant is still in custody, found *coram nobis* inappropriate.

The court held, precisely as the government has contended throughout these proceedings, that as long as the indictment alleged a scheme that amounts to mail fraud under post-*McNally* standards, although in pre-*McNally* language, the conviction should not be disturbed. The court stated:

> *McNally* knocked out the prosecution's principal theory in Keane's case but does not establish that the indictment failed to state an offense. An indictment adverting principally to rights to faithful service still may lead to a valid conviction if the prosecution shows that the defendant defrauded someone out of property, including intangible property.

Slip op. at 10. Moreover, the court specifically declined to subject the jury charge to scrutiny under post-*McNally* standards:

> The intangible rights approach was such a centerpiece of the trial that it would be difficult to conclude, as we did in [*United States v. Wellman,* 830 F.2d 1453 (7th Cir. 1987)], that a jury instructed as this one was necessarily found the existence of a scheme to defraud within the meaning of *McNally* . . . . As we have emphasized, however, and as Keane's lawyer conceded at oral argument, if the indictment states an offense,

> that is the end of things for relief in the nature of coram nobis .... An error in the jury instructions — when a valid conviction could have been had under different instructions on at least one count of this 17-count indictment — is not the sort of fundamental defect that produces a complete miscarriage of justice.

Id. at 11-12 (citations omitted)[1] Here, as in *Keane,* the indictment charged, although in "honest and faithful services" language, a scheme to defraud that would constitute mail fraud under post-*McNally* standards.[2]

The court in *Keane* found a second independently sufficient basis for denial of *coram nobis*: the legal issue presented had been raised, fully litigated, and resolved adversely to Keane prior to trial and on direct appeal. Slip op. at 12. The court distinguished between section 2255 and *coram nobis*, and held that the latter remedy was unavailable to address an issue that was already fully considered:

> [Coram nobis] was and is not a device to relitigate

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[1] The court also based its conclusion in part on the same factor identified by Judge Friendly in *United States v. Keogh,* 391 F.2d 138, 148 (2d Cir. 1968) — the unlikelihood of retrial. The court explained, "Keane does not want an order setting his case for a new trial, with all the risks of fresh punishment that entails; he wants absolution without risk or cost." Slip op. at 12. Appellees take issue with the view expressed by Judge Friendly in *Keogh* that *coram nobis* requires a greater showing than Section 2255, and point to Judge Friendly's comments in *United States v. Travers,* 514 F.2d 1171, 1173 n.1 (2d Cir. 1974), that "the standards applied [under Section 2255 and] in federal *coram nobis* are similar." That observation, however, was made in the context of a petition based not on instructional error but on an intervening change in the law that eviscerated the evidentiary basis for the convictions. In that context, as Judge Friendly observed, the standards for the two remedies may well be similar. As *Keane* makes clear, however, where the error claimed is in the jury charge, the standards are, and should be, quite different.

[2] The similarity of this case and *Keane* is illustrated by this Court's citation, in its original panel opinion, of Keane's conviction as an example of a mail fraud conviction based on the same honest and faithful srvices rationale employed here. *See United States v. Mandel,* 591 F.2d 1347, 1363-64 (4th Cir. 1979).

> issues fully ventilated at the time of the conviction. Section 2255 permits relitigation if the defendant is in custody and there is an intervening change in the law. The reason to bend the usual rules of finality is missing when liberty is not at stake. Courts must conserve their scarce time to resolve the claims of those who have yet to receive their *first* decision.

Slip op. at 6-7 (emphasis in original). Here, as in *Keane*, the issues raised in this *coram nobis* proceeding were fully litigated in the district court and on direct appeal at the time of conviction. The prior authoritative resolution of these issues considerably heightens appellees' burden, if it does not foreclose relief altogether.[3]

Unable to cite any case in which *coram nobis* has been granted to cure instructional error, appellees rely on post-*McNally* authority arising in different procudural contexts. They cite cases decided on direct appeal,[4] which simply have no bearing in this *coram nobis* proceeding, where their burden is far greater. In addition, they rely on *United States v. Shelton,* No. 87-2865 (10th Cir. May 26, 1988) (*en banc*), and *Ingber v. Enzor*, 841 F.2d 450 (2d Cir. 1988), both cases in which relief under section 2255 was granted in light of *McNally*. As the court held in *Keane,* however, appellees bear a far greater burden on *coram nobis*

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[3] The court also held that a third factor, the absence of any continuing civil disability with respect to Keane, warranted denial of *coram nobis*. The court noted that Keane was disbarred from the practice of law but later readmitted, and that the only continuing impact of the conviction was his loss of the $27,000 fine and the scar on his record. Neither consideration, the court held, was sufficient to warrant *coram nobis* relief. Slip op. at 7-9. The court rejected the reasoning of the district court here insofar as the district court held that the government's retention of a fine satisfied the requirement that there be a continuing civil disability in order to warrant *coram nobis*. *Id.* at 9. The government has not contested that all appellees have made the necessary showing of continuing adverse consequence, Appellant's Brief at 18 n.10, and therefore does not ask this Court to reach the third basis for the court's decision in *Keane*.

[4] *See United States v. Ochs*, 842 F.2d 515 (1st Cir. 1988); *United States v. Piccolo*, 835 F.2d 517 (3d Cir. 1987), *cert. denied*, 56 U.S.L.W. 3818 (1988).

review than they would if they were proceeding under section 2255, since their liberty is not at stake. Moreover, in neither *Shelton* nor *Ingber* was the court's determination to grant relief based solely on the jury charge. In *Shelton* the court granted relief both because there was a complete lack of evidence that the scheme to defraud affected property, and because the jury instructions were flawed. *See* Slip Op. at 25-26 ("The record thus contains no evidence that the payment of kickbacks caused the county any pecuniary loss"). In *Ingber,* the count on which the conviction was vacated arose from an election fraud scheme, which did not implicate property interests like the scheme at issue here. Even if the standard in a Section 2255 proceeding were comparable to the *coram nobis* standard, appellees cite no case in which a conviction was vacated under Section 2255 based on instructional error notwithstanding a sufficient evidentiary foundation.

Finally, confronted with a complete absence of authority to support their position, appellees attempt to elevate what is plainly a statutory issue to constitutional magnitude, contending that the jury instructions deprived them of due process. They suggest that the alleged error here is like a jury instruction allowing a finding of guilt by a preponderance of the evidence,[5] or a jury charge that absolutely fails to inform the jury of one of the elements of the offense.[6] No such error is present here. The jury was charged repeatedly as to the proper burden of proof, J.A. 734-35, 737, 738, 739, 745, 753, and was instructed as to each

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[5] *See Jackson v. Virginia,* 443 U.S. 307, 320 n. 14 (1979) (cited at Appellees' Brief at 55).

[6] *See Cole v. Young,* 817 F.2d 412, 424 (7th Cir. 1987) (cited at Appellees' Brief at 55); *Glenn v. Dallman,* 686 F.2d 418, 419-21 (6th Cir. 1982) (cited at Appellees' Brief at 55); *see also Hoover v. Garfield Heights Municipal Court,* 802 F.2d 168, 178 (6th Cir. 1986) (cited at Appellees' Brief at 55-56), *cert. denied,* 107 S.Ct. 1610 (1987). Appellees contend, based on this line of authority, that failure to instruct the jury as to an element of an offense is a due process deprivation, but fail to cite the substantial authority to the contrary. *See, e.g., Redding v. Benson,* 739 F.2d 1360, 1363-65 (8th Cir. 1984), *cert. denied,* 469 U.S. 1222 (1985); *United States v. Brown,* 616 F.2d 844, 845-48 (5th Cir. 1980); *United States v. Valdez,* 594 F.2d 725, 728-29 (9th Cir. 1979). *Cf. Rose v. Clark* 106 S.Ct. 3101, 3107-09 (1986).

element it must find to convict the defendants of mail fraud. J.A. 734. What is challenged with respect to the jury instructions is the precise language used in the explanation of one of those elements — the scheme to defraud. The issue is purely statutory, and cannot by sleight of hand be conveyed constitutional stature in order to lighten appellees' burden.

Appellees cannot obscure the applicable standard of review. Even assuming that the prior resolution of the issues they raise is not dispositive, they must establish that the indictment and evidence were wholly insufficient to support their convictions. Alternatively, even if this Court, unlike the court in *Keane*, finds that some limited review of the jury charge is appropriate, appellees must establish that the jury charge was so flawed that it brought about a complete miscarriage of justice. They make neither showing.

* * * *

Appellees fall far short of satisfying their burden. The indictment charged and the evidence established a scheme which is mail fraud under current law. The jury instructions required the necessary findings that the scheme deprived the State of property — the value of payments to Mandel as well as the value of the State's racing days. The trial record and verdicts make clear that the jury in fact so found. "At some point the judicial system must close old files and turn to the future. . . ." *United States v. Keane,* Slip op. at 13. Appellees' convictions should be reinstated, and their files retired.

* * * *

Supreme Court, U.S.
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No. 88-1178

In the Supreme Court of the United States

OCTOBER TERM, 1988

THOMAS E. KEANE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner is entitled to a writ of error coram nobis vacating his 1974 mail fraud conviction even though (1) petitioner's challenge to the instructions given at his trial was fully considered and rejected on direct appeal; (2) petitioner suffers no current civil disability as a result of his conviction; and (3) the indictment states an offense and the evidence presented at trial supports a conviction, although the jury instructions may have been erroneous.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1178

THOMAS E. KEANE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 852 F.2d 199. The opinion of the district court (Pet. App. 15a-24a) is reported at 678 F. Supp. 708.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 1988. A petition for rehearing was denied on October 17, 1988. Pet. App. 14a. On November 28, 1988, Justice O'Connor granted an extension of time to and including January 15, 1989, within which to file the petition. The petition was filed on January 14, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1974, petitioner was convicted of mail fraud, in violation of 18 U.S.C. 1341, for acts committed in connection with his service on Chicago's City Council. His conviction was upheld on direct appeal. 522 F.2d 534 (1975), cert. denied, 424 U.S. 976 (1976). Petitioner served his sentence, he was paroled in 1978, and in 1980 he was released from parole. In 1987, this Court decided *McNally* v. *United States,* 483 U.S. 350, in which it held that the mail fraud statute did not prohibit schemes to defraud citizens of their "intangible right" to honest government services. Petitioner subsequently sought a writ of error coram nobis in the United States District Court for the Northern District of Illinois. He requested that the court vacate his conviction and order the government to return his fine of $27,000. The district court denied the application. Pet. App. 15a-24a. The court of appeals affirmed. *Id.* at 1a-13a.

1. The evidence at petitioner's trial showed that while he served on Chicago's City Council petitioner formed a partnership that purchased more than 1,800 tax delinquent properties at Cook County scavenger sales. Petitioner selected the parcels for purchase based on his knowledge about where City agencies intended to buy property. The partnership held the parcels through an Illinois land trust, a device that enabled the beneficial owners to conceal their interests in the partnership. Petitioner then used his influence as chairman of the Council's Finance Committee to have special assessment liens removed from most of his parcels for much less than the value of the liens.[1] Pet.

[1] To remove the liens, it was necessary to cause foreclosure proceedings to be instituted by the City. A subcommittee of the Finance Committee recommended a minimum bid, usually at least 30% of the lien on the property, necessary to obtain the property free of the encumbrance. The City Council voted on the subcommitte's recommendation and the Cook County Circuit Court regularly approved the

App. 2a-3a, 16a-18a. Finally, petitioner "induced his friends in public agencies to buy these parcels," usually at much more than the market price. *Id.* at 3a. For example, the evidence showed that the Metropolitan Sanitary District bought 102 parcels that it thought were worth $150 each from petitioner for $775 per parcel. *Id.* at 18a.

The indictment described the scheme in detail and charged that petitioner had defrauded the citizens of Chicago of their intangible right to petitioner's faithful and loyal services and their intangible right to have the city's business conducted free from fraud and deceit. The court's charge instructed the jury that it need not find that petitioner made a profit in order to convict him. Rather, it was sufficient under the charge that the jury find that petitioner had acted in his official capacity without telling anyone about his private interest. At trial, petitioner objected to the "intangible rights" aspects of the indictment and the jury instructions. Pet. App. 15a-16a, 18a. The district court and court of appeals disagreed with petitioner's position, however, and this Court denied his petition for a writ of certiorari. *Id.* at 3a.

2. In *McNally*, this Court held that mail fraud convictions could not be based on the theory that public officials' conduct had deprived the citizens of their intangible right to honest and impartial government, which the Court concluded was not a property interest protected by the statute. Thereafter, petitioner filed his coram nobis petition, ask-

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resulting proposed minimum bid. As chairman of the Finance Committee, petitioner had the subcommittee recommend minimum bids of about 10% on most of his properties and voted to approve those minimum bids without disclosing his interest in the parcels. Pet. App. 17a. Petitioner was not able to purchase at auction all of the parcels at the "sale" price, but he obtained about 1,000 of the parcels in an unencumbered state at low cost. *Id.* at 3a.

ing that his conviction be set aside and that the government return the fine of $27,000 that he had paid.[2]

The district court denied relief. Pet. App. 15a-24a. It concluded that "the indictment charged, and the evidence showed, that Keane schemed to deceive the citizenry and to deprive it of what is unquestionably property: money and/or confidential government information." *Id.* at 21a. The court explained that in selecting the parcels he bought, petitioner used inside information about where government agencies would be buying land, thus depriving the citizenry of a property interest under *Carpenter* v. *United States,* No. 86-422 (Nov. 16, 1987). In addition, petitioner schemed to have the special assessment liens removed from the parcels at low cost and then to sell them to the City at high cost. Pet. App. 22a.[3]

3. The court of appeals affirmed. Pet. App. 1a-13a. The court first canvassed the history of the writ of coram

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[2] Congress recently amended the federal fraud statutes to provide that a "scheme or artifice to defraud includes a scheme or artifice to deprive another of the intangible right of honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4508. The legislative history of the new provision explains that "[t]his section overturns the decision in *McNally* v. *United States* * * *. The intent is to reinstate all of the pre-*McNally* caselaw pertaining to the mail and wire fraud statutes without change." 134 Cong. Rec. S17,376 (daily ed. Nov. 10, 1988). Petitioner, of course, must be judged according to the pre-amendment version of the mail fraud statute as construed in *McNally*.

[3] There was conflicting evidence at trial as to whether petitioner ultimately made a profit from the scheme, and a state court subsequently determined that he did not. *Chicago ex rel. Cohen* v. *Keane,* 105 Ill. App. 3d 298, 434 N.E.2d 325 (1982). But the mail fraud statute proscribes schemes to defraud, whether or not they are successful, and the district court accordingly concluded that petitioner's "shortcomings as a 'businessman' do not cleanse him of criminal culpability." Pet. App. 23a.

nobis. The court concluded that the writ had been used to correct fundamental factual errors and to raise previously unavailable legal issues. Based on its historical analysis, the court determined that coram nobis "is not a device to relitigate issues fully ventilated at the time of the conviction." Since petitioner had challenged the intangible rights theory at his trial and on direct appeal, the court concluded that he ought not be allowed to challenge that theory now that he is no longer in custody. *Ibid.*

Alternatively, the court stated that "[t]o the extent that a petition for a writ of error coram nobis is a way to relitigate claims," a litigant must show that his conviction "produces lingering civil disabilities" and that the error was the "type of defect that would have justified relief during the term of imprisonment." Pet. App. 7a. The court of appeals then determined that petitioner failed both of those tests.

After observing that petitioner had conceded that he has not been under any existing civil disability as a result of his conviction since his law license has been reinstated, the court expressly disagreed with the Ninth Circuit's conclusion in *Hirabayashi* v. *United States*, 828 F.2d 591 (1987), that coram nobis relief is warranted merely to remove a conviction from a person's record. Pet. App. 8a. The court of appeals also concluded that the fact that petitioner had paid a $27,000 fine did not entitle him to seek coram nobis relief, since the fine was a "sunk cost rather than a continuing disability producing additional injury as time passes." *Ibid.* The court noted (*id.* at 4a) that it was absolutely clear under *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394 (1981), that if petitioner had been found civilly liable for fraud, if he had been assessed $27,000 in damages, and if the judgment had become final, he would not be able to recover the money on account of a subsequent change in the law.

The court next concluded that petitioner had failed to show that he would be entitled to relief under 28 U.S.C. 2255 if he were still in custody. In *Davis* v. *United States*, 417 U.S. 333 (1974), this Court concluded that a change in the substantive law such as the change made by *McNally* must be applied retroactively, but it also made clear that relief is warranted only if, under the change in the law, a conviction could be said to be a "miscarriage of justice." Pet. App. 10a, quoting 417 U.S. at 346. Here, the court of appeals acknowledged, the jury instructions emphasized the "intangible rights" theory. For that reason, the court explained, it would be difficult to uphold the conviction, if it were pending on direct appeal, on the theory that the jury necessarily concluded that petitioner devised a scheme to obtain property as defined in *McNally*. Pet. App. 11a. However, the court found, the indictment plainly stated an offense under *McNally*, as petitioner was charged with using "the City's confidential information about its plans for acquiring property," inducing "the City Council to set a reserve price of only 10% of the special assessments, instead of the usual 30%," and inducing "his friends to buy the parcels, on behalf of public agencies, for more than they were worth." *Id.* at 10a. In that circumstance, the court concluded, petitioner's conviction would not have been disturbed on collateral attack under Section 2255, and should not now be overturned by way of a writ of error coram nobis.

The court summarized: "[T]hree independently sufficient reasons require the denial of relief in the nature of coram nobis. First, the legal contention Keane presents was raised and resolved adversely to him on a full record after the opportunity to ventilate all arguments; second, Keane is not under a civil disability as a result of his conviction; third, the indictment states an offense." Pet. App. 12a.

DISCUSSION

Although the courts below correctly rejected petitioner's claim, review is warranted on account of disagreements among the courts of appeals as to the proper standards for granting coram nobis relief.

1. In *United States* v. *Morgan,* 346 U.S. 502, 506 (1954), this Court noted that relief "in the nature of the ancient writ of *coram nobis* is not specifically authorized by any statute enacted by Congress," but it held that coram nobis relief may be granted pursuant to the All Writs Act, 28 U.S.C. 1651.[4] The Court added that not all errors, but only those "of the most fundamental character," warrant coram nobis relief. 346 U.S. at 512, quoting *United States* v. *Mayer,* 235 U.S. 55, 69 (1914). It stressed that the "[c]ontinuation of litigation after final judgment and exhaustion or waiver of any statutory right of review should be allowed through this extraordinary remedy only under circumstances compelling such action to achieve justice." 346 U.S. at 511.[5]

a. This Court has never decided whether coram nobis review is available to reconsider a legal argument that was fully considered on direct appeal. While the Court in *Davis* v. *United States*, 417 U.S. 333 (1974), held that an intervening change in the law that negates the presence of

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[4] "Coram nobis" means "before us." *Black Law's Dictionary* 304 (5th ed. 1979). The name originated because the writ was sought from the court that originally entered judgment, as opposed to the writ of error coram vobis ("before you"), which was sought from an appellate court. *Id.* at 304-305.

[5] While he was a minor, the defendant in *Morgan* had pleaded guilty to a federal charge without waiving his right to counsel, which was an error under *Johnson* v. *Zerbst,* 304 U.S. 458 (1938). The Court allowed him to reopen his federal conviction pursuant to a writ of error coram nobis after he was given a longer term as a second offender upon being convicted of a state offense.

a crime is a basis for collateral attack under Section 2255, persons seeking relief on that basis are still in custody. As the court of appeals observed (Pet. App. 6a-7a), the reasons supporting the reopening of a final judgment to reconsider an issue that has been fully litigated are much less compelling where a litigant is no longer in custody. In that circumstance, the court of appeals held, it is not appropriate for a court to revisit a legal issue that was fully ventilated previously.

That conclusion is contrary to the Second Circuit's decision in *United States* v. *Travers,* 514 F.2d 1171 (1974). In that case the court held that coram nobis relief is available to a litigant who has raised on direct appeal the issue he seeks to raise in his coram nobis proceeding. *Id.* at 1172. Thus, the first factor relied upon by the court below as precluding petitioner from obtaining relief by way of coram nobis review was held by the Second Circuit to authorize that relief.[6]

b. There is a clear and acknowledged conflict among the circuits on the second ground invoked by the court of appeals to support its decision. As the court below recognized (Pet. App. 8a), the Ninth Circuit did not require the coram nobis petitioner in *Hirabayashi* v. *United States,* 828 F.2d 591 (1987), to establish that he was suffering from any continuing civil disability as a result of his conviction. Instead, the Ninth Circuit expressly stated that "*coram nobis* relief is available to prevent manifest in-

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[6] The court below would not allow a litigant to obtain coram nobis review if he had waived his right to pursue a legal issue by failing to appeal. Rather, it concluded that coram nobis relief is available to pursue only those legal issues that were "previously unavailable." Pet. App. 7a. That limited scope is comparable to the scope available for raising factual issues by way of coram nobis. The writ was traditionally available only to correct factual errors, and then only in unusual situations. See *Morgan*, 346 U.S. at 507 & n.9.

justice 'even where removal of a prior conviction will have little present effect on the petitioner.' " 828 F.2d at 606, quoting *Holloway* v. *United States*, 393 F.2d 731, 732 (9th Cir. 1968). The Ninth Circuit's approach is to presume that any conviction has collateral consequences, an approach that is squarely at odds with the approach taken by the court below. 828 F.2d at 606.[7]

In addition to the express conflict on this issue between the Seventh and Ninth Circuits, the Third Circuit recently indicated its lack of confidence as to the proper standard for determining whether a coram nobis petitioner is suffering collateral consequences serious enough to warrant reconsideration of his conviction. See *United States* v. *Osser*, 864 F.2d 1056 (1988). Questioning the approach taken in *Hirabayashi*, the court "admit[ted] to some uncertainty that Osser has established the requisite showing of collateral consequences" by alleging that his conviction resulted in the denial of a pension. *Id.* at 1060. The Third Circuit concluded, however, that it did not have to resolve the matter because the petitioner had failed to raise on direct appeal the issue he sought to raise by way of coram nobis. *Id.* at 1062.

c. There is also an acknowledged conflict among the circuits on the third ground invoked by for the court of appeals to support its decision. In *United States* v. *Mandel*, 862 F.2d 1067 (4th Cir. 1988), the government relied on the decision in this case and argued that coram nobis is not ap-

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[7] In *Morgan*, this Court noted that "[s]ubsequent convictions may carry heavier penalties" as the result of a prior conviction (346 U.S. at 512-513). That statement appears at first blush to support the Ninth Circuit's analysis. In *Morgan*, however, the coram nobis petitioner had actually been "sentenced to a longer term as a second offender" because of the conviction he sought to challenge by way of coram nobis (*id.* at 504). Thus, he plainly was disadvantaged as a result of the conviction that he sought to challenge.

propriate where "the change in the law did not vitiate the criminality of the petitioner's conduct but only brings into question the propriety of the jury instructions." 862 F.2d at 1075. The Fourth Circuit refused to follow the approach taken by the Seventh Circuit in this case. Instead, the Fourth Circuit concluded that coram nobis relief is warranted based on an error in the jury instructions if the instructions permitted the jury to convict the defendants on a theory that was subsequently rejected by this Court. *Ibid.*

The Third Circuit recently adopted an approach similar to that taken by the court of appeals in this case and very different from the approach taken by the Fourth Circuit. In *United States* v. *Stoneman,* No. 88-5294 (Mar. 13, 1989), slip op. 11, another case involving a challenge to a mail fraud conviction, the court acknowledged that the jury instructions were faulty, but it declined to issue a writ of error coram nobis because "[t]he indictment * * * charged and the evidence the jury heard established an offense within the meaning of § 1341, as interpreted by the Supreme Court in *McNally*."[8] The Sixth Circuit, on the other hand, recently granted a writ of error coram nobis overturning a mail fraud conviction in light of *McNally* in *Allen* v. *United States*, No. 88-5250 (Feb. 16, 1989). The court there did not suggest that the standard of review dif-

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[8] The Third Circuit explained in *Stoneman* that the coram nobis petitioner "failed to meet the burden imposed on him in a *coram nobis* proceeding of overcoming the presumption that his conviction was valid. It is not enough for him to show that it *may* have been invalid. This conclusion * * * properly balances the tension between principles of finality and the law's ideal of seeing that no man is improperly convicted. It also serves to distinguish the type of review available on direct appeal from the less searching examination into trial error available on collateral review through the more limited remedy of *coram nobis*." Slip op. 12.

fers in a coram nobis proceeding from the standard of review on direct appeal. The court therefore reversed merely because it concluded that the jury instructions were erroneous. See slip op. 5-6.

In our view, the Fourth and Sixth Circuits erred. "An error in the jury instructions * * * is not the sort of fundamental defect that produces a complete miscarriage of justice" where the defendant could have been convicted, under proper instructions, on the evidence presented at trial. Pet. App. 12a. Indeed, since there can be no serious dispute that petitioner violated the mail fraud statute as construed in *McNally*,[9] it is hard to see how a miscarriage of justice occurred when he was convicted of mail fraud.[10]

2. The aftermath of this Court's *McNally* decision shows that there may be many requests for coram nobis relief whenever this Court decides that courts of appeals have given a criminal statute too broad a construction. In addition, as the conflicts between the decision below and the Second Circuit's decision in *Travers* and the Ninth Circuit's decision in *Hirabayashi* demonstrate, the current disagreement is not limited to intangible rights mail fraud cases. Given the acknowledged conflicts as to what sort of lingering consequences a litigant must demonstrate to obtain coram nobis review and whether coram nobis relief should be granted on account of erroneous jury instructions, together with the uncertainty as to whether coram

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[9] As both courts below concluded, the evidence showed that petitioner used the City of Chicago's confidential information when buying property, had liens removed at 10% of their value rather than the normal 30%, and sold parcels to City agencies at more than their market price. Pet. App. 10a-11a, 21a-22a.

[10] Accordingly, on this point the decision below is not contrary to the Second Circuit's decision in *Travers*. The court there stressed that "there was no sufficient evidence to support [the defendant's] conviction." 514 F.2d at 1178.

nobis review is available to reconsider legal issues that were fully ventilated on direct appeal, we believe that review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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